Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

WILLIAM ARAMONY and THOMAS J. MERLO,
Petitioners,

v.

UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether co-conspirator liability for a substantive offense under *Pinkerton* v. *United States,* 328 U.S. 640 (1946), requires proof that the offense was reasonably foreseeable as a necessary and natural consequence of the conspiracy?

2. Whether a directed verdict on an element of an offense can be harmless error?

3. Whether the Fifth Amendment Due Process Clause requires an evidentiary hearing when the parties submit directly conflicting affidavits and pleadings on factual disputes essential to resolution of a claim of attorney-client privilege?

4. Whether a defendant is entitled to a theory of defense instruction?

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PETITION FOR WRIT OF CERTIORARI

William Aramony and Thomas J. Merlo petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-46a) is reported at 88 F.3d 1369. The district court's oral rulings (App. 50a-75a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 1996. A timely petition for rehearing was denied on August 13, 1996. App. 47a-48a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in part: "[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

A. The Indictment.

On September 13, 1994, a grand jury in the Eastern District of Virginia returned a lengthy indictment against petitioners William Aramony and Thomas J. Merlo and two other defendants.[1] The indictment charged that petitioners had conspired to commit various financial offenses against United Way of America ("UWA") and to defraud the United States (18 U.S.C. § 371). It also charged petitioners with a series of substantive offenses, including mail and wire fraud (18 U.S.C. §§ 1341 and 1343), interstate transportation of fraudulently acquired property (18 U.S.C. § 2314), money laundering (18 U.S.C. § 1956),

[1] The jurisdiction of the district court was founded on 18 U.S.C. § 3231.

engaging in monetary transactions in the proceeds of specified unlawful activity (18 U.S.C. § 1957), and filing (or aiding the filing of) false tax returns (26 U.S.C. §§ 7206(1) and 7206(2)).

B. Jury Instructions.

1. *Pinkerton.*

The prosecution requested an instruction under *Pinkerton* v. *United States,* 328 U.S. 640 (1946), permitting the jury to find the defendants guilty of substantive offenses committed by their co-conspirators in furtherance of the conspiracy. Petitioners objected to the proposed instruction because it omitted the requirement that the substantive offense be reasonably foreseeable as a necessary and natural consequence of the conspiracy. The district court overruled the objection and gave the *Pinkerton* instruction without the "reasonable foreseeability" element. App. 70a-72a.

2. *Materiality.*

The district court declined to submit the element of materiality to the jury on the false tax return counts. Instead, the court instructed the jury, over objection, that false deductions and omitted income are material matters. Following the verdict but before sentencing, this Court held in *United States* v. *Gaudin,* 115 S. Ct. 2310 (1995), that the element of materiality under 18 U.S.C. § 1001 must be submitted to the jury. Petitioners moved for a new trial on the tax counts in light of *Gaudin.* The district court denied the motion.

3. *Theory of Defense.*

The district court refused to give a theory of defense instruction, despite having been requested to do so by counsel. App. 69a. The court stated that it was up to counsel to give their theory in closing argument, despite the fact that such instruction is proper under *United*

States v. *Hicks*, 748 F.2d 854, 857 (4th Cir. 1984), and in every circuit. *See, e.g., United States* v. *Mandel*, 602 F.2d 653, 656 (4th Cir. 1979) (law in every circuit is that defendant is entitled to theory of defense instruction) (Widener, J., dissenting), *cert. denied*, 445 U.S. 961 (1980).

C. The Attorney-Client Privilege Issues.

Aramony moved to suppress his communications (and their fruits) with attorneys Lisle C. Carter, Jr., former UWA general counsel, and Berl Bernhard and James F. Hibey of the law firm Verner, Liipfert, Bernhard, McPherson & Hand. He also sought to suppress his communications with representatives of The Investigative Group, Inc. ("IGI"), which Carter had retained. Aramony contended that the communications were protected by the attorney-client privilege. In support of that contention, he submitted his own declaration and those of attorney Thomas H. Boggs, Jr., and former UWA Senior Vice-President Gail Manza.

In addition to these declarations, Aramony submitted (among other materials) IGI's notes of conversations in January 1992 with Hibey of Verner, Liipfert and with the UWA General Counsel, in which both appear to acknowledge that Verner, Liipfert has been retained to represent the UWA Board *and* Aramony; a chronology prepared by IGI, which reflects IGI's conclusion at two different points in February 1992 that Bernhard and Hibey represented Aramony; and a memorandum from Bernhard to Aramony dated March 1, 1992, marked "ATTORNEY WORK PRODUCT PRIVILEGED AND CONFIDENTIAL," in which Bernhard advised Aramony on the terms of his separation from UWA.

The prosecution argued that Aramony did not have an attorney-client relationship with the attorneys. It submitted declarations from the attorneys and others (including a contradictory declaration by Boggs) and additional

materials. Carter's declaration stated that his "employer and sole client was UWA" and that "[a]t no time did I represent to Aramony that I represented him or his individual interests." The district court denied Aramony's motion without an evidentiary hearing (or even oral argument) on the ground that "[t]he affidavits presented by all the lawyers in the case have stated that there was no attorney/client relationship." App. 53a.

At trial, Jeff Nason of IGI testified over objection to Aramony's communications with IGI during several interviews in January 1992. Nason's testimony about those communications touched on almost every aspect of the charges against Aramony. Carter as well testified over objection to his communications with Aramony.[2]

In his trial testimony, Carter contradicted the portion of his declaration quoted above. Carter testified that, after he became UWA general counsel, he represented both Aramony and UWA in the preparation of Aramony's 1988 employment contract. Aramony renewed his request for an evidentiary hearing on the attorney-client issue in light of the conflict between Carter's testimony and his declaration. The district court denied the renewed motion. App. 63a.

Merlo also moved pretrial to suppress his attorney-client communications. He contended that John Hume, his then-counsel, had disclosed privileged attorney-client

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[2] Although no attorney from Verner, Liipfert testified at trial, the firm—which represented both UWA and Aramony from January 1992 until early March 1992—disclosed Aramony's confidential communications and work-product to the prosecution, which then used that information to develop leads and otherwise prepare its case. In addition, Verner, Liipfert represented UWA at trial, and it represented prosecution witnesses Clatterbaugh, Walthall, and Carter as well. All evidence obtained through the government's derivative use of Aramony's communications with Verner, Liipfert should have been excluded. *See, e.g., United States* v. *Schwimmer*, 924 F.2d 443, 446 (2d Cir.), *cert. denied*, 502 U.S. 810 (1991); *United States* v. *Schwimmer*, 892 F.2d 237, 244-45 (2d Cir. 1989).

communications to the government without his knowledge or authority. The statement, memorialized by the government, detailed Hume's version of matters that he had allegedly discussed with his client, Merlo. Upon discovery of this unauthorized disclosure, Merlo moved the district court to suppress Hume's statement and prohibit the government from making direct or derivative use of the information that Hume provided. On the date of the hearing, Merlo and Hume appeared and counsel was prepared to go forward with an evidentiary hearing. After the government stated that it would not make direct use of the Hume statement at trial, the court denied the motion as to derivative use without the requested hearing. App. 50a, 54a-56a.

D. The Appeal.

After more than 40 hours of deliberation, the jury found petitioners guilty on most counts.[3] The district court sentenced Aramony to 84 months incarceration and Merlo to 55 months incarceration. Both appealed. Among other contentions, they argued (1) that the district court erred in omitting the "reasonable foreseeability" element from the *Pinkerton* instruction; (2) that the district court erred in directing a verdict on the materiality element of the tax counts; and (3) that the court violated their right to due process by failing to conduct

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[3] At the close of the government's case, the district court granted judgment of acquittal on a number of substantive counts and ordered that the conspiracy count be redacted to remove certain allegations. Aramony was convicted under the redacted indictment on Count 1 (conspiracy), Counts 2-8 and 10 (mail and wire fraud), Counts 11-19 (interstate transportation of fraudulently acquired property), Counts 21 and 24 (monetary transactions in property derived from specified unlawful activity), and Counts 36, 38, 41, 43, and 45 (filing or aiding in filing false tax returns). Merlo was convicted on Counts 1 (conspiracy), 4 (mail fraud), 9 (wire fraud), 11, 13-15 (interstate transportation of fraudulently acquired property), 20, 21, and 24 (monetary transactions in property derived from specified unlawful activity), 27, 29, 32-35, and 37 (filing or aiding in filing false tax returns).

an evidentiary hearing on their respective motions to suppress use of their attorney-client privileged communications. In addition, Merlo contended that the district court erred in refusing to give a theory of defense instruction.

The court of appeals rejected these contentions. App. 38a-45a. First, on the *Pinkerton* issue, the court relied on its previous decision in *United States* v. *Chorman*, 910 F.2d 102 (4th Cir. 1990), which—without discussing the "reasonable foreseeability" issue—had approved a *Pinkerton* instruction similar to the one at issue here. The court concluded that "the district court did not abuse its discretion in omitting the 'reasonably foreseeable' language from the *Pinkerton* instruction." App. 22a.

Second, on the materiality issue, the court of appeals assumed without deciding that *Gaudin* required that element to be submitted to the jury, rather than decided by the court. But the court held that the error in directing a verdict on materiality was harmless, because the jury had been required to find that, on the tax returns at issue, "the income was understated or . . . the deductions were overstated by some substantial amount." The court of appeals concluded that the jury's finding on the "substantiality" issue was equivalent to a finding on materiality. App. 30a.

Third, on Aramony's contention that his claim of attorney-client privilege should not have been decided without an evidentiary hearing, the court declared: "Because the affidavits submitted by the government and the testimony of the government's witnesses, when taken at face value, reveal there was no chance Aramony would prevail on his claim, the district court did not err when it refused to hold an evidentiary hearing." App. 40a n.12. The court reached a similar conclusion with respect to Merlo's claim of privilege. App. 45a n.14. The court did not address decisions from other circuits holding that an evidentiary hearing was required.

Fourth, on Merlo's appeal, the court of appeals failed to specifically address the district court's error in refusing to permit a theory of defense instruction, summarily finding it without merit. App. 45a.

Aramony and Merlo sought rehearing by the panel and suggested rehearing en banc. They called the court's attention to the conflicts between the panel decision and decisions from other circuits. The court of appeals denied both petitions without comment. App. 48a.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' HOLDING THAT PROOF OF "REASONABLE FORESEEABILITY" IS NOT REQUIRED FOR *PINKERTON* LIABILITY CONFLICTS WITH DECISIONS FROM OTHER CIRCUITS.

The court of appeals' decision upholding the district court's omission of the "reasonable foreseeability" element from its *Pinkerton* instruction places the Fourth Circuit squarely in conflict with other circuits. The decision also ignores the government's concession at oral argument that the district court had erred in omitting the reasonable foreseeability element.

In *Pinkerton*, 328 U.S. 640, this Court held that a defendant may be convicted of certain substantive offenses committed by his co-conspirators. Because *Pinkerton* identified no statutory basis for the theory of liability it created and appears to rest upon federal common law,[4] its boundaries remain vague. In particular, this Court has never squarely decided whether "reasonable foreseeability" is an element of *Pinkerton* liability. On that point, *Pinkerton* itself is arguably ambiguous. Although the instruction in that case did not include the "reasonable fore-

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[4] *But cf. United States* v. *Coolidge*, 14 U.S. (1 Wheat) 415 (1816) (no federal common law crimes); *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32 (1812) (same).

seeability" element, *see id.* at 645-46 n.6, the decision did not concern instructional error. The pertinent question was whether the evidence was sufficient to convict Daniel Pinkerton of various substantive offenses. In deciding that question in the affirmative, this Court declared that

> [a] different case would arise if the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, *or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement.*

Id. at 647-48 (emphasis added). Thus, the Court implied that if the substantive offenses were *not* reasonably foreseeable, no co-conspirator liability would arise.

The decisions of the courts of appeals have reflected the ambiguity of *Pinkerton* itself on the "reasonable foreseeability" issue. On one hand, the Fourth Circuit in this case held that the element need not be included in a *Pinkerton* instruction, and decisions from other circuits have approved instructions that omitted the "reasonable foreseeability" element without specifically addressing that issue. *See, e.g., United States* v. *Vasquez,* 858 F.2d 1387, 1393 (9th Cir. 1988), *cert. denied,* 488 U.S. 1034 (1989); *United States* v. *Manzella,* 791 F.2d 1263, 1267 (7th Cir. 1986).

On the other hand, a number of cases hold that "reasonable foreseeability" *is* an essential element of *Pinkerton* liability. *See, e.g., United States* v. *Mothersill,* 87 F.3d 1214, 1218 (11th Cir. 1996) ("Liability will not lie [under *Pinkerton*], however, if the substantive crime 'did not fall within the scope of the unlawful project, or was merely part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural

consequence of the unlawful agreement.'" (quoting *Pinkerton*, 328 U.S. at 647-48)); *United States* v. *Pimentel*, 83 F.3d 55, 58 (2d Cir. 1996) ("Under *Pinkerton*, a coconspirator who does not directly commit a substantive offense may be liable for that offense if it was committed by another coconspirator in furtherance of the conspiracy and was a reasonably foreseeable consequence of the conspiratorial agreement."); *United States* v. *Friend*, 50 F.3d 548, 553 (8th Cir. 1995) ("[T]he government must prove that Apker's possession of a silencer-equipped firearm could have been reasonably foreseen by Friend, as a natural or necessary consequence of their conspiracy."), *cert. denied*, 116 S. Ct. 814 (1996); *United States* v. *Turcks*, 41 F.3d 893, 897 (3d Cir. 1994) ("[A] jury must find that a party to the conspiracy committed a crime both 'in furtherance of' *and* 'as a foreseeable consequence of' the conspiracy to find a co-conspirator guilty of a substantive offense committed by a co-conspirator." (emphasis in original)), *cert. denied*, 115 S. Ct. 1716 (1995); *United States* v. *Pinkney*, 15 F.3d 825, 828 (9th Cir. 1994) ("[T]o the extent that [a court] dispenses with the requirement of reasonable foreseeability, it relies on an erroneous interpretation of [*Pinkerton*]." (quotation omitted)); *United States* v. *Broadwell*, 870 F.2d 594, 603 (11th Cir.) ("Failure to include the 'reasonably foreseeable' language extends vicarious liability for co-conspirators' acts which may have furthered the conspiracy's objectives but were outside the range of actions originally intended or envisioned."), *cert. denied*, 493 U.S. 840 (1989).[5]

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[5] A number of the cited cases address the elements that the government must prove to establish liability under *Pinkerton*, rather than the content of a proper *Pinkerton* instruction. It is axiomatic, however, that a proper instruction must require the jury to find every element that the government is required to prove; as this Court has made clear, a defendant has a Fifth and Sixth Amendment right to a jury determination on every element necessary for conviction. *See Gaudin*, 115 S. Ct. at 2313-16.

The Court should grant the writ of certiorari to resolve this split in the circuits. The need for the Court to act is particularly great because *Pinkerton* liability is a Supreme Court-created doctrine. No statutory language or legislative history exists to guide the courts in determining the scope of the criminal responsibility that Pinkerton recognized. A ruling is needed from this Court both to guide the lower federal courts on the scope of *Pinkerton* liability and to provide "fair warning . . . to the world in language that the common world will understand" of the potential liability that conspirators face for the substantive offenses of their co-conspirators. *McBoyle* v. *United States,* 283 U.S. 25, 27 (1931).

II. THE COURT OF APPEALS' HOLDING THAT THE DISTRICT COURT'S DIRECTED VERDICT ON THE MATERIALITY ELEMENT OF THE TAX OFFENSES IS SUBJECT TO HARMLESS ERROR ANALYSIS CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS.

The Court should grant certiorari to decide whether a directed verdict on an element of an offense—here, the element of materiality under 26 U.S.C. §§ 7206(1) and 7206(2)—is subject to harmless error review. This issue has sharply divided the circuits, particularly following this Court's decisions in *Sullivan* v. *Louisiana,* 508 U.S. 275 (1993), and *Gaudin,* 115 S. Ct. 2310.

In *Gaudin,* this Court held that the issue of "materiality" under 18 U.S.C. § 1001 must be submitted to the jury. The Court found that the defendant has a Sixth Amendment right to jury trial on every element of the offense, including those elements (such as materiality) that are mixed questions of law and fact. *See id.* at 2313-16.

Gaudin makes clear that the district court violated petitioners' jury trial right when it directed a verdict on

the materiality element of the tax offenses. Like § 1001, the offenses of filing a false tax return and aiding and assisting the filing of a false tax return include the element of materiality. *See, e.g., United States* v. *Rogers*, 853 F.2d 249, 251 (4th Cir.), *cert. denied*, 488 U.S. 946 (1988). The district court declined to submit the issue of materiality to the jury. Instead, the court instructed the jury, over objection, that false deductions and omitted income are material matters.

The court of appeals found the partial directed verdict to be harmless error in light of the district court's instruction requiring the government to prove that "the income was understated or . . . the deductions were overstated by some substantial amount." App. 26a. The court based its harmless error analysis on two previous decisions—*United States* v. *Johnson*, 71 F.3d 139 (4th Cir. 1995), and *United States* v. *Forbes*, 64 F.3d 928 (4th Cir. 1995). As summarized by the *Aramony* court, those decisions hold that "the application of harmless-error analysis to errors involving the failure to instruct or the giving of a conclusive instruction on an element of the crime is appropriate where the jury has made an independent finding on the equivalent or identical element of the crime." App. 28a.

This Court's decisions appear to foreclose harmless error analysis for a partial directed verdict. In *Rose* v. *Clark*, 478 U.S. 570 (1986), the Court declared that harmless error analysis does not apply to certain types of errors, including " 'entering a judgment of conviction or directing the jury to come forward with such a verdict . . . regardless of how overwhelmingly the evidence may point in that direction.' " *Id.* at 578 (quoting *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977)); *see also Carella* v. *California*, 491 U.S. 263, 266 (1989) (per curiam); *Id.* at 269 (Scalia, J., concurring in judgment) (trial court's error in directing a verdict against the defendant "would not be cured by an appellate court's

determination that the record evidence *unmistakably* established guilt, for that would represent a finding of fact by judges, not by a jury" (emphasis in original)); *Connecticut* v. *Johnson*, 460 U.S. 73, 84, 87-88 (1983) (plurality opinion) (conclusive presumption, like a directed verdict, "deprived respondent of constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error") (quotation omitted); *Id.* at 95-97 (Powell, J., joined by Burger, C.J., Rehnquist & O'Connor, JJ., dissenting) (plurality incorrectly equated conclusive presumption, which should be subject to harmless error analysis, with directed verdict, which cannot be harmless).

Most recently in *Sullivan*, this Court held that an erroneous reasonable doubt instruction is not subject to harmless error review. The Court declared:

> Since . . . there has been no jury verdict within the meaning of the Sixth Amendment, the entire premise of *Chapman* review is simply absent. There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered is utterly meaningless. There is no *object*, so to speak, upon which harmless-error scrutiny can operate.

508 U.S. at 280 (emphases in original). The same analysis applies to a partial directed verdict; harmless error analysis cannot be applied because, as to the element on which the verdict was directed, "[t]here is no object . . . upon which harmless error scrutiny can operate." *Id.*[6]

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[6] Recently, on review of a habeas case, the Court in a per curiam opinion concluded that the relatively relaxed harmless error standard of *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993), applied to an instruction that omitted a portion of the intent element of the state law offense. *California* v. *Roy*, 1996 U.S. LEXIS 6589 (U.S. Nov. 4, 1996). But *Roy* does not address the issue here: the availability of harmless error review for a partial directed verdict on direct appeal in a federal case.

Despite the clarity with which this Court has spoken, the circuits are split on the application of harmless error review to a partial directed verdict. The Fourth Circuit (in this case, *Forbes*, and *Johnson*) and some other circuits undertake a limited form of harmless error analysis that focuses on whether the jury made a finding equivalent to the element at issue. *See, e.g., Waldemer* v. *United States*, 1996 U.S. App. LEXIS 27403, at *7 (7th Cir. Oct. 21, 1996) (failure to submit element to jury is harmless if "the jury, in rendering its verdict as to another count or offense, had by that very decision necessarily also found the existence of the element in question beyond a reasonable doubt"); *United States* v. *Rogers*, 94 F.3d 1519 (11th Cir. 1996) (harmless error analysis appropriate under three limited circumstances; noting split in circuits); *United States* v. *Raether*, 82 F.3d 192, 193-94 (8th Cir. 1996) (*Gaudin* error harmless if the jury made findings "that are so closely related to the materiality issue that they are functionally equivalent to a materiality finding").[7]

Other circuits hold that harmless error analysis cannot apply to a directed verdict on an element of the offense. *See, e.g., United States* v. *Dirico*, 78 F.3d 732, 737 (1st Cir. 1996) ("Here, because the jury did not determine whether the government had proved beyond a reasonable doubt, the existence of an essential element of the crime of false subscription (*i.e.*, materiality), there was no 'jury verdict within the meaning of the Sixth Amendment' and harmless error analysis is inapplicable." (quoting *Sullivan*, 508 U.S. at 280)); *United States* v. *Pettigrew*, 77 F.3d 1500, 1511 (5th Cir. 1996) (declining to conduct harmless error review of omitted materiality instruction);[8] *United States* v. *Gaudin*,

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[7] *But cf. United States* v. *Baumgardner*, 85 F.3d 1305, 1309-10 (8th Cir. 1996) (following *Raether* but questioning whether *Gaudin* error can ever be harmless).

[8] *But cf. United States* v. *McGuire*, 79 F.3d 1396, 1403-04 (noting conflict over harmless error review of partial directed verdict and

28 F.3d 943, 951 (9th Cir. 1994) (instruction that statements were material as a matter of law "cannot be harmless"), *aff'd on other grounds*, 115 S. Ct. 2310 (1995).

As the Eleventh Circuit noted in *Rogers*, "further guidance and clarification would be extremely helpful" to the lower federal courts in addressing the availability of harmless error review for a partial directed verdict. The Court should grant certiorari to resolve the split in the circuits and to provide the requested "guidance and clarification." *Rogers*, 94 F.3d 1519.

III. THE COURT OF APPEALS' HOLDING THAT PETITIONERS' CLAIMS OF ATTORNEY-CLIENT PRIVILEGE COULD BE RESOLVED AGAINST THEM WITHOUT AN EVIDENTIARY HEARING CONFLICTS WITH DECISIONS FROM OTHER CIRCUITS.

The court of appeals' decision affirming the denial of an evidentiary hearing on petitioners' motions to exclude attorney-client communications conflicts with decisions from its own and other circuits holding that a hearing is required under the circumstances here. *See, e.g., United States* v. *Taylor*, 13 F.3d 786, 789 (4th Cir. 1994) ("When material facts that affect the resolution of a motion to suppress evidence seized during a warrantless search are in conflict, the appropriate way to resolve the conflict is by holding an evidentiary hearing after which the district court will be in a position to make findings."); *United States* v. *Pena*, 961 F.2d 333, 338-39 (2d Cir. 1992) (evidentiary hearing required when material facts affecting suppression in dispute); *United States* v. *Berkowitz*, 927 F.2d 1376, 1385-88 (7th Cir. 1991) (same).

The court of appeals' decision conflicts most directly with the Fifth Circuit's decision in *United States* v. *Fortna*, 796 F.2d 724 (5th Cir.), *cert. denied*, 479 U.S. 950 (1986). In *Fortna*, a defendant—Harnage—filed a pre-

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declining to resolve issue), *rehearing en banc granted*, 90 F.3d 107 (5th Cir. 1996).

trial motion to dismiss the indictment on the ground that the government had improperly obtained evidence from his attorney—Smith—in violation of his Fifth and Sixth Amendment rights. Harnage submitted an affidavit in support of his motion. The district court conducted an evidentiary hearing on the motion, at which testimony was obtained from the FBI agent (Evans) who was the main contact between attorney Smith and the government. Based on this testimony, and without permitting Harnage to subpoena Smith to testify at the hearing, the district court found that no attorney-client relationship existed between Smith and Harnage. *See id.* at 729.

The Fifth Circuit held that the district court had erred in not permitting Harnage to subpoena Smith. The court of appeals noted the conflicts between Evans' testimony and Harnage's affidavit, and it concluded that "Harnage should not, without good cause, be denied the opportunity which he requested to present Smith as a witness." *Id.* at 731. The court added that "Harnage should have been allowed the opportunity to present Smith's testimony, no good reason having been shown why Harnage's request to exercise this normally available right should be denied." *Id.*; *see also In re United States*, 878 F.2d 153, 157-58 (5th Cir.) ("evidentiary pretrial hearing" appropriate vehicle to resolve claim of breach of attorney-client privilege), *cert. denied*, 493 U.S. 991 (1989); *United States* v. *Costanzo*, 625 F.2d 465, 470 (3d Cir. 1980) (remanding for evidentiary hearing on claim that attorney disclosed privileged communications to government).

The court of appeals' decision cannot be reconciled with these cases. This Court should grant the writ of certiorari to resolve the conflict.

IV. THE COURT OF APPEALS' FAILURE TO REVERSE MERLO'S CONVICTION BASED ON THE DISTRICT COURT'S REFUSAL TO GIVE A THEORY OF DEFENSE INSTRUCTION CONFLICTS WITH DECISIONS FROM OTHER CIRCUITS.

It is settled law in all circuits that upon request a defendant is entitled to a theory of the defense jury instruction for which there is a foundation in evidence. *See, e.g., United States* v. *Swallow,* 511 F.2d 415, 523 (10th Cir.) *cert. denied,* 423 U.S. 845 (1975); *United States* v. *Noah,* 475 F.2d 688, 697 (9th Cir.), *cert. denied,* 414 U.S. 1095 (1973); *United States* v. *Dana,* 457 F.3d 205, 208 (7th Cir. 1972); *United States* v. *Vlair,* 456 F.2d 514, 520 (3d Cir. 1972); *United States* v. *Leach,* 427 F.2d 1107, 1112 (1st Cir.), *cert. denied,* 400 U.S. 829 (1970); *United States* v. *Blane,* 375 F.2d 249, 252 (6th Cir.) *cert. denied,* 389 U.S. 835 (1967); *Perez* v. *United States,* 297 F.2d 12, 15-16 (5th Cir. 1961); *Apel* v. *United States,* 247 F.2d 466, 474 n.8 (2d Cir. 1956); *Tatum* v. *United States,* 190 F.2d 612, 617 (D.C. Cir. 1951). The entitlement to a theory of the defense instruction is so fundamental that oblique references to the instruction are insufficient. *United States* v. *Mitchell,* 495 F.2d 285, 287-88 (4th Cir. 1974).

During argument on jury instructions, Merlo requested that the district court give a theory of the defense instruction. App. 69a. The court erroneously refused Merlo's request to give such an instruction, App. 69a, and the Fourth Circuit affirmed, App. 46a, threatening what has been a clear and important defense entitlement. In so holding, the court of appeals placed itself squarely in conflict with other circuits. The Court should therefore grant certiorari on this issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

Nos. 95-5532, 95-5553 and 95-5554

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

WILLIAM ARAMONY,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

STEPHEN J. PAULACHAK,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

THOMAS J. MERLO,
Defendant-Appellant.

Argued March 7, 1996

Decided July 17, 1996

Before WIDENER, HAMILTON, and LUTTIG, Circuit Judges.

No. 95-5532, affirmed in part, vacated in part, and remanded; No. 95-5553, affirmed; No. 95-5554, affirmed in part, vacated in part, and remanded by published opinion. Judge HAMILTON wrote the opinion, in which Judge WIDENER and Judge LUTTIG joined.

OPINION

HAMILTON, Circuit Judge:

After a jury trial, the appellants, William Aramony, Thomas Merlo, and Stephen Paulachak, were convicted of numerous violations of federal laws for participating in a scheme to defraud the United Way of America (UWA). More specifically, Aramony was convicted of conspiracy to defraud the United States by impeding the lawful functions of the IRS, *see* 18 U.S.C. § 371; six counts of mail fraud, *see* 18 U.S.C. § 1341; two counts of wire fraud, *see* 18 U.S.C. § 1343; nine counts of engaging in interstate transportation of fraudulently acquired property, *see* 18 U.S.C. § 2314; two counts of engaging in monetary transactions in the proceeds of specified unlawful activity, *see* 18 U.S.C. § 1957; three counts of filing false tax returns, *see* I.R.C. § 7206(1); and two counts of aiding the filing of false tax returns, *see* I.R.C. § 7206(2). Merlo was convicted of conspiracy to defraud the United States by impeding the lawful functions of the IRS, one count of mail fraud, one count of wire fraud, four counts of interstate transportation of fraudulently acquired property, three counts of engaging in monetary transactions in property derived from specified unlawful activity, three counts of filing false tax returns, and four counts of aiding in the filing of false tax returns. Paulachak was convicted of conspiracy to defraud the United States by impeding the lawful functions of the IRS, one count of wire fraud, and

six counts of filing false tax returns.[1] The district court sentenced Aramony to eighty-four months' imprisonment, Merlo to fifty-five months' imprisonment, and Paulachak to thirty months' imprisonment. Additionally, pursuant to 18 U.S.C. §§ 853 & 982, the district court ordered Aramony and Merlo to forfeit $552,188.97 because of thir convictions under 18 U.S.C. § 1957. On appeal, the appellants challenge their convictions and sentences on numerous fronts. For the reasons stated herein, we affirm all of the appellants' convictions except the convictions of Aramony and Merlo for engaging in monetary transactions in the proceeds of specified unlawful activity. The district court's instructions on these counts did not require the jury to make a finding on an essential element for this offense. Because we are precluded from applying harmless-error analysis to this error under the circumstances of this case, these convictions must be vacated. Consequently, the forfeiture order must be vacated, and the cases of Aramony and Merlo must be remanded for resentencing. As to Paulachak's sentence, we affirm.

I

UWA is a nonprofit organization that acts as a service organization for local United Way organizations located throughout the United States. Aramony became the chief executive officer of UWA in 1970, and he held that position until he was fired in March 1992. Merlo, a certified public accountant and close friend of Aramony, began performing accounting services for UWA on a consulting basis in the 1970s. In July 1989, Merlo became UWA's interim chief financial officer, and approximately six months later, he took the job on a permanent basis. Pau-

[1] Additionally, the jury acquitted Aramony on two counts of engaging in monetary transactions in the proceeds of specified unlawful activity, acquitted Merlo on one count of aiding in the filing of a false tax return, and acquitted Paulachak on one count of interstate transportation of fraudulently acquired property and three counts of aiding the filing of false tax returns.

lachak began working for UWA in the 1970s. In 1988, he left UWA to become the president of Partnership Umbrella, Inc. (PUI).[2]

From the mid-1980s to the early 1990s, the appellants improperly used UWA money for personal gain. The nature of the scheme was primarily to use UWA money to assist Aramony in furthering his relationships with various women. However, UWA money was also used to pay a variety of Aramony's other personal expenses. For example, when Aramony visited New York, he often used the chauffeuring service of Charles Harrison. From 1988 to 1990, Aramony incurred over $100,000 in bills due to his use of Harrison's service. Although Aramony used the service for UWA business, he also used it for personal business. Nonetheless, Aramony always had UWA pay Harrison's bills and listed all these bills as business expenses. Aramony's personal use of Harrison's service and his causing UWA to pay Harrison's bills formed the basis for his convictions on four counts of engaging in the interstate transportation of fraudulently acquired property.

Although the government's arsenal of information of Aramony's wrongdoing was extensive, the government's case at trial basically focused on Aramony's use of UWA funds to further his relationships with various women, especially Lori Villasor and Anita Terranova. From December 1986 to July 1990, Aramony had a personal re-

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[2] The UWA Board of Directors established PUI as a for-profit organization in December 1986 to ensure UWA's continued 501 (c) (3) status (charitable status). PUI was designed to act as a support organization for charities and "to aid and assist not-for-profit organizations to secure the economic and related benefits of volume purchasing through development and management of national purchasing programs on behalf of such organizations." (Joint Appendix (J.A.) 643). Additionally, PUI was designed to use its income "for purposes consistent with those of United Way['s] domestic and international activities," and PUI's property was "irrevocably dedicated to charitable purposes. . . ." *Id.* at 670.

lationship with Lori Villasor. From late 1988 to mid-1990, Aramony travelled to Gainesville, Florida, Villasor's hometown, at least once a month to visit Villasor, and he had UWA pay for these trips. On some of his trips to Gainesville, Aramony used UWA money to pay for rental cars. The billing of Aramony's flights to Gainesville to UWA and the billing of his rental cars in Gainesville to UWA formed the basis of two of Aramony's convictions for mail fraud.

Aramony also used UWA money to help pay for taking Villasor with him on UWA business trips and vacations. In December 1988, Aramony took Villasor to London and Paris for her birthday. In December 1989, he took her on a two-week trip to London and Cario. And in April 1990, Aramony used UWA money to fly Villasor to London, England to be with him while he and Paulachak attended a board meeting of Charities Fund Transfer (CFT), like PUI a "spin-off" corporation established with the approval of the UWA Board of Directors. Merlo gave Laura Shifflet, one of Aramony's assistants, his UWA corporate credit card number so that she could use it to charge Villasor's airline tickets. In addition, Paulachak arranged for $50,000 of CFT's money to be transferred to his Diner's Club card, and part of this money ($4,529.94) was used to pay the chauffeuring bill that Villasor incurred while in London. These events formed the basis for Aramony's convictions of three counts of mail fraud, two counts of wire fraud, and one count of engaging in the interstate transportation of fraudulently acquired property. The $50,000 wire transfer to CFT's money to Paulachak's Diner's Club card formed the basis for his conviction of one count of wire fraud.

The government also introduced evidence that Aramony used Merlo to provide Villasor with money. From 1988 to 1991, Merlo received over $300,000 in consulting fees from PUI despite doing no work for the money. Merlo, in turn, paid Villasor a total of $89,000 over this period.

One manner of getting Villasor this money was to have Merlo pay her a monthly salary despite Villasor doing, at the most, only a day or two of work. One transaction involving a $25,000 bonus from UWA to Merlo, $5,000 of which was a reimbursement to Merlo for a previous wire transfer to Villasor, formed the basis of one of Aramony's and Merlo's convictions for engaging in the interstate transportation of fraudulently acquired property.

Terranova lived in Florida and had a long history with Aramony. As with Villasor, Aramony often traveled to Florida at UWA expense to visit her. Importantly, Aramony bought a condominium in Florida to meet Terranova. The money for this apartment came from a donation that Mutual of America (MOA)—an insurance company that did business with UWA—made to UWA. In 1987, MOA decided to donate the interest from a $1 million fund to the William Aramony Initiatives in Voluntarism Fund (WAIF), a restricted fund at UWA, intending that the money be used "to support the expansion of the nation's voluntary sector." (Trial Transcript at 1934). On December 10, 1987, the UWA Board passed a resolution that gave Aramony wide discretion to use the money that MOA contributed to WAIF. Under this authority, Aramony caused the MOA money to be transferred from WAIF to Voluntary Initiatives America (VIA), a Florida 501(c)(3) corporation.

VIA was formed in April 1990, with Aramony as its chairman, his son as its president, and Merlo as its secretary/treasurer. On the same day that VIA was formed, Merlo caused a UWA check drawn upon the MOA donation to be issued for $125,576.92 to VIA. Several days later Aramony used the money from this check to buy the condominium in Florida for him and Terranova. UWA funds, namely, $10,000, were used to furnish this condominium. In June 1991, the condominium was sold to PUI for approximately $125,000. The acquisition, furnishing, and sale of the Florida condo-

minium formed the basis of Aramony's and Merlo's convictions for one count of mail fraud, two counts of engaging in the interstate transportation of fraudulently acquired property, and one count of engaging in monetary transactions in the proceeds of specified unlawful activity.

Merlo also used his position as UWA chief financial officer to enrich himself. After Merlo took on his position on a full time basis, UWA purchased an annuity from MOA in the amount of $375,000. PWA was listed as the "employer-owner," and Merlo was listed as the annuitant. Merlo was to acquire the right to the proceeds of the annuity only at the expiration of the deferral period, during which he, as the annuitant, remained employed by UWA. It was further provided that Merlo would forfeit any rights to the annuity if his employment was terminated prior to the expiration of the deferral period. During the deferral period, the annuity remained the property of UWA. The deferral period was initially intended to end on January 1, 1992, but Merlo extended it to January 1, 1993.

Around January 1992, Merlo contacted MOA and requested that the funds in the annuity be handed over to him at that time. MOA, however, informed Merlo that the annuity remained UWA property because he had elected to extend the deferral period until January 1993. Merlo then instructed UWA general manager, Thomas Nunan, to withdraw from the MOA annuity the total funds, which at that time had grown to $427,188.97. Nunan did so, sending MOA a letter prepared by UWA comptroller, Gregory Walthall. MOA sent a check made out to UWA, and the funds were deposited into a UWA bank account.

Merlo then had Walthall complete an application for a new annuity to be purchased from Transamerica Occidental Life Insurance Company (Transamerica). Merlo instructed Walthall to work with Jeffrey Bonina, a financial sales manager for Transamerica, who worked in

Florida. On January 29, 1992, Nunan signed the application for the Transamerica annuity, which identified United Way as the owner of the policy and Merlo as the annuitant.

But a few days after the new application was sent to Bonina, Merlo asked Bonina to hold the paperwork on the annuity so that he could check with his attorney to see if he instead of UWA owned the annuity. Merlo then got back together with Bonina and told him that he did indeed own the annuity. Bonina then filled out a new application for the annuity that listed Merlo as the annuity owner. Because Merlo was now listed as the annuity owner, he was able to withdraw $120,000. The events surrounding Merlo's annuity formed the basis of Merlo's convictions for one count of wire fraud, one count of engaging in the interstate transportation of fraudulently acquired property, and two counts of engaging in monetary transactions in the proceeds of specified unlawful activity. On the basis of the events surrounding the Merlo annuity, the jury convicted Aramony of one count of engaging in the interstate transportation of fraudulently acquired property and one count of engaging in monetary transactions in the proceeds of specified unlawful activity.

The appellants' aforementioned fraudulent conduct coupled with their subsequent false deductions and understatement of income formed the basis for their convictions for conspiracy to defraud the United States through the filing of false tax returns and numerous substantive counts for filing and aiding in the filing of false tax returns. The government's proof at trial established that Aramony aided in the filing of UWA's false tax returns for tax years 1989 and 1990 and that he filed false personal income-tax returns for tax years 1988 through 1990. The government's proof also established that Merlo aided in the filing of false tax returns for PUI in tax years 1989 and 1990, aided in the filing of two false 1099s for work Villasor never did, and filed three other false tax returns. Finally,

the government's proof established that Paulachak filed false tax returns for PUI in tax years 1988 through 1991 and false personal income-tax returns for tax years 1989 and 1990.

II

Aramony contends that all his convictions must be reversed because the district court erroneously admitted inflammatory and unfairly prejudicial evidence depicting his sexual misconduct. The district court admitted testimony from several UWA female employees who testified that they had sexual relationships with Aramony. The district court also admitted testimony from two UWA employees, Alice Clatterbaugh and Barbara Florence, that Aramony made sexual advances toward them. Aramony most strongly objects to the testimony of Clatterbaugh and Florence. According to Aramony, the district court should have excluded their testimony under Federal Rule of Evidence 403. We first review in detail the challenged testimony of Clatterbaugh and Florence.

Clatterbaugh testified that beginning in 1985, Aramony made numerous sexual advances toward her. A series of these advances occurred while Clatterbaugh accompanied Aramony on a business trip to Florida in the early part of 1985. Clatterbaugh testified that upon her arrival in Florida, Aramony began acting differently toward her. For example, Aramony told Clatterbaugh that she looked nice and kissed her on the cheek—the first time that Aramony had acted this way toward her. After Clatterbaugh arrived at the hotel, she discovered another surprise. When she entered her room, she discovered that there were two bedrooms in the suite and that she and Aramony would be sleeping in them. She told Aramony that she had expected to have her own room. Aramony, who was in charge of the travel arrangements, replied that she did have her own room, but that it was in the suite.

Next, Clatterbaugh testified that during their first evening in Florida, Aramony made several sexual advances

toward her. The first one occurred while they worked together in the suite. Clatterbaugh rebuffed the advance, telling him "that [she] was not there to play, that [she] was there to work." (J.A. 116-17). Aramony made a second advance during a reception for the participants of the meeting by telling Clatterbaugh not to bother to turn down her bed that evening, because she would be in his room. Later that evening, after Clatterbaugh had taken a shower but while she was still in the bathroom and in her bath robe, Aramony knocked at her bathroom door and after she opened the door he made another sexual advance toward her. Clatterbaugh rejected this sexual advance also.

After being rejected for the third time, Aramony had an hour-long conversation with Clatterbaugh during which he tried to persuade her to have a relationship with him. In particular, Clatterbaugh testified that Aramony told her that a relationship with him would entail many advantages for her, such as: (1) not "hav[ing] to worry about money"; (2) being able to "go further in the company"; (3) being able to "go on trips with him"; and (4) having him "do anything [she] wanted" because he had a lot of power. *Id.* at 1123-24. Nonetheless, Clatterbaugh still refused Aramony's invitation for a personal relationship. Upon hearing her refusal, Aramony told her that she "was stupid" and that her decision would have negative consequences for her professional future at UWA. *Id.* at 1124. Specifically, Clatterbaugh testified that Aramony told her that her decision meant that she would not be able to travel with him any more and that she would not advance professionally within UWA.

Despite Clatterbaugh's clear rejections of his sexual advances, Aramony still would not take "no" for an answer. Clatterbaugh testified that approximately two weeks after Aramony and she had returned to UWA headquarters from Florida, Aramony made another sexual advance toward her. Aramony called Clatterbaugh into an unlit

office, telling her that they did not need the lights on. Aramony then again asked whether Clatterbaugh desired to have a relationship with him and again discussed the benefits of such a relationship. Clatterbaugh refused, and Aramony made another sexual advance toward her. At this point, Clatterbaugh "told him if he ever did it again, [she] would kill him." *Id.* at 1131.

Florence testified to similar behavior toward her by Aramony. Like Clatterbaugh, Aramony used the opportunity provided by a UWA business trip to make sexual advances toward Florence. In the spring of 1985, Florence accompanied Aramony to Nashville for a conference for all the local United Ways in the Southeast. As with Clatterbaugh, Aramony had arranged for them to share a suite with two bedrooms. While Florence locked her bedroom door on the first night, on the suggestion of Aramony, she did not lock her bedroom door on the second night. The next morning, Aramony told Florence "that he knew [she had] slept well because he had come in and chacked and [she] seemed to be sleeping very peacefully." *Id.* at 1248. Later that morning, Aramony made a sexual advance toward Florence that she promptly refused. That afternoon, Aramony and Florence flew back from Nashville to Virginia. During their flight to Virginia, Aramony "put his hand on [Florence's] leg and said that we would just keep it between the two of [them]." *Id.*

A few days after Florence and Aramony had returned to UWA headquarters, Florence confronted Aramony about the incident. During this confrontation, she told Aramony "[t]hat [she] thought he was a sex maniac or a pervert or whatever you want to call it and that [she] didn't want to be around him anymore." *Id.* at 1249. Additionally, she told Aramony that she had informed her husband about his sexual advances.

Florence then testified that Aramony next attempted to calm her negative reaction to his sexual advances by

offering her a higher paying posiion within UWA. Florence, who did not want to take another person's job unfairly, refused Aramony's offer. She, howeevr, did inform Aramony that she desired a lateral transfer to a vacant position. After waiting approximately two months, a position in Paulachak's office came open, and Florence became Paulachak's assistant executive assistant. At the time, Paulachak was a senior vice-president at UWA.

The district court admitted the testimony of Clatterbaugh and Florence over the timely objection of Aramony. We review a district court's evidentiary rulings for an abuse of discretion. *United States v. Ham,* 998 F.2d 1247, 1252 (4th Cir.1993). Because the district court has first-hand knowledge of the trial proceedings, we have consistently held that the district court should be afforded "wide discretion" in determining whether evidence is unduly prejudicial and that the district court's evidentiary determinations should not be overturned "except under he most 'extraordinary' of circumstances." *United States v. Heyward,* 729 F.2d 297, 301 n. 2 (4th Cir.1984) (quoting *United States v. MacDonald,* 688 F.2d 224, 227 (4th Cir.1982), *cert. denied,* 459 U.S. 1103, 103 S.Ct. 726, 74 L.Ed.2d 951 (1983)), *cert. denied,* 469 U.S. 1105, 105 S.Ct. 776, 83 L.Ed.2d 772 (1985). Our review of the trial proceedings and the testimony reveals that the challenged testimony of Clatterbaugh and Florence was properly admissible under Federal Rules of Evidence 404(b) and 403, and therefore, the district court did not abuse its discretion by admitting the challenged evidence.

Rule 494(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Rule 404(b), which we have characterized as an inclusionary rule, *see United States v. Mark,* 943 F.2d 444, 447 (4th Cir. 1991), gives a nonexhaustive list of issues other than character for which a district court

may properly admit prior bad act evidence. For example, the district court may admit prior bad act evidence to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Fed.R.Evid.404(b).

Evidence of prior bad acts is admissible if the acts are "(1) relevant to an issue other than character, (2) necessary, and (3) reliable." *United States v. Rawle*, 845 F.2d 1244, 1247 (4th Cir.1988) (footnotes omitted). To be relevant, evidence need only to have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed.R. Evid. 401. Evidence is necessary if it " 'furnishes part of the context of the crime.' " *Rawle*, 845 F.2d at 1247 n. 4 (quoting *United States v. Smith*, 446 F.2d 200, 204 (4th Cir.1971)). Finally, under the test set forth above, evidence is reliable and should be submitted to the fact finder unless it is "so preposterous that it could not be believed by a rational and properly instructed juror." *See United States v. Bailey*, 990 F.2d 119, 123 (4th Cir. 1993).

Even if evidence has been deemed admissible under Rule 404(b), it must still be evaluated under Rule 403 and must be excluded if its probative value is substantially outweighed by the danger of undue prejudice. *See Rawle*, 845 F.2d at 1247. We have stated that undue prejudice occurs when there is "a genuine risk that the emotions of a jury will be excited to irrational behavior, and that this risk is disproportionate to the probative value of the offered evidence." *Ham*, 998 F.2d at 1252 (internal quotation marks omitted). Because the evidence sought to be excluded under Rule 403 is concededly probative, the balance under Rule 403 should be struck in favor of admissibility, and evidence should be excluded only sparingly. *United States v. Terzado-Madruga*, 897 F.2d 1099, 1117 (11th Cir.1990). Finally, we note that the unfair

prejudicial value of evidence "can be generally obviated by a cautionary or limiting instruction, particularly if the danger of prejudice is slight in view of the overwhelming evidence of guilt." *United States v. Masters,* 622 F.2d 83, 87 (4th Cir.1980). We now address the admissibility of the challenged evidence.

The testimony of Clatterbaugh and Florence was properly admissible under Rule 404(b). First, their testimony was relevant to show Aramony's motive in perpetrating his various frauds on the UWA. Specifically, it tended to prove that Aramony defrauded the UWA by mail and by wire in order to seek sexual pleasures at no financial cost to himself. For the same reason, the testimony of Clatterbaugh and Florence meets the necessity prong of the Rule 404(b) test—it unquestionably placed Aramony's actions into context. Finally, the testimony of Clatterbaugh and Florence meets the third prong of the Rule 404(b) test because it was certainly not so preposterous that it could not be believed by a rational and properly instructed juror.

Now that we have determined that the testimony of Clatterbaugh and Florence was properly admissible under Rule 404(b), we must consider whether the probative value of that evidence was substantially outweighed by the danger of unfair prejudice. Aramony contends that the morally offensive nature of their testimony unfairly prejudiced him as a loathsome man. We disagree.

The testimony of Clatterbaugh and Florence is not of the kind that would create a genuine risk that the emotions of the jury would be excited to irrational behavior. First, the nature of the evidence here, heterosexual misconduct, could in no way come close to creating the genuine risk of unfair prejudice that was created in *Ham* by the district court's admission of evidence showing the defendant molested children, engaged in homosexual conduct, compared women to dogs, and condoned the phys-

ical mistreatment of women *See Ham*, 998 F.2d at 1251-54. Second, the district court gave the jury a cautionary instruction, which cures any unfair prejudice except in the most extraordinary circumstances.[3] *See Masters*, 622 F.2d at 87 ("Such prejudice, if any, can be generally obviated by a cautionary or limiting instruction."). Such an extraordinary circumstance is not present here. Third, the absence of unfair prejudice is further demonstrated by the fact that the jury returned a mixed verdict, evidencing that the jury was not excited to irrational behavior during its deliberations.[4]

In conclusion, we hold that the district court did not abuse its discretion by admitting the testimony of Clatterbaugh and Florence.

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[3] Here, the district court gave the following cautionary instruction to the jury:

> Now, you have heard evidence and testimony about Mr. Aramony's alleged sexual conduct, including alleged sexual harassment of certain employees. You may consider this testimony only as it may bear upon the elements of the specific offenses charged in this case. You must not consider this testimony for any other purpose.
>
> In particular, you must not permit any moral or emotional reaction to this testimony to affect in any way your determination of whether the prosecution has proven the charges against Mr. Aramony beyond a reasonable doubt.

(J.A. 1594-95).

[4] Far from allowing the wholesale admissibility of the government's proffered evidence of Aramony's sexual misconduct, the record reveals that the district court carefully sifted through the evidence and accordingly prevented the government from eliciting the "gory details" related to the challenged evidence. For example, the government proffered that Clatterbaugh would testify that Aramony's conduct toward her involved showing up naked at her door, putting her hand on his crotch, and saying something to the effect of "see what you are missing." (J.A. 1104). The district court found that this testimony would be unduly prejudicial and prevented the government from introducing it.

Aramony also contends that the district court should have excluded as inflammatory and unfairly prejudicial evidence that Villasor was only seventeen years old at the time he began having a personal relationship with her. While we do believe Villasor's afe should have been excluded as irrelevant evidence, we do not bliv that its erroneous admission warrants reversal of any of Aramony's convictions because the jury was presented with overwhelming evidence of his guilt and Villasor's age was only one fact about one of many women who testified regarding Aramony's sexual exploits.[5]

III

The appellants contend that the district court erroneously instructed the jury in three respects: (1) omitting the "reasonable foreseeability" language from its *Pinkerton*[6] instruction; (2) directing a verdict, as to the tax

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[5] Merlo and Paulachak also complain about the district court's admission of the testimony of Clatterbaugh and Florence and the evidence of Villasor's age. They contend that the loathsome nature of that testimony was bound to have a spillover effect upon them, denying them a fair trial. Accordingly, they contend that they were entitled to a severance from the trial of Aramony, especially in light of the fact that the district court did not give the jury a limiting instruction that specifically pertained to them. We find no merit in their contentions because: (1) conspirators who are indicted together normally should be tried together, *see Zafiro v. United States*, 506 U.S. 534, 537-38, 113 S.Ct. 933, 937, 122 L.Ed2d 317 (1993); (2) the jury returned a mixed verdict that demonstrates it sifted carefully through all the evidence, *see United States v. Porter*, 821 F.2d 968, 972 (4th Cir.1987) ("Convictions should be sustained if it may be inferred from the verdicts that the jury meticulously sifted the evidence."), *cert. denied*, 485 U.S. 934, 108 S.Ct. 1108, 99 L.Ed.2d 269 (1988); and (3) the general nature of the cautionary instruction that the district court gave the jury in relation to this evidence, especially since the evidence was not so complicated as to prevent the jury from separating it and properly applying it only to those against whom it was offered.

[6] *Pinkerton v. United States*, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946).

counts, for the government on the element of "materiality"; and (3) instructing the jury that the government was not required to prove an actual effect on interstate commerce under 18 U.S.C. § 1957. We will address each of these contentions in turn.

A

The first jury instruction that the appellants take issue with is the district court's *Pinkerton* instruction. The *Pinkerton* doctrine imposes vicarious liability on a co-conspirator for the substantive offenses committed by other members of the conspiracy when the offenses are during and in furtherance of the conspiracy. *Pinkerton,* 328 U.S. at 646-47, 66 S.Ct. at 1183-84; *see also Nye & Nissen v. United States,* 336 U.S. 613, 618, 69 S.Ct. 766, 769, 93 L.Ed. 919 (1949) (stating *Pinkerton* "held that a conspirator could be held guilty of the substantive offense even though he did no more than join the conspiracy, provided that the substantive offense was committed in furtherance of the conspiracy and as a part of it"); *United States v. Chorman,* 910 F.2d 102, 101 (4th Cir.1990) (same). "The idea behind the *Pinkerton* doctrine is that the conspirators are each other's agents; and a principal is bound by the acts of his agents within the scope of the agency." *United States v. Manzella,* 791 F.2d 1263, 1267 (7th Cir.1986).

Before the trial, the government and the appellants submitted proposed jury instructions to the ditsrict court. After receiving the government's proposed instructions, the appellants objected to the government's proposed *Pinkerton* instruction. In particular, they argued that the government's proposed *Pinkerton* instruction omitted the requirement that the "offense be reasonably foreseeable as a necessary or natural consequence of the conspiratorial agreement." (J.A. 581).

During its charge to the jury, the district court gave the following *Pinkerton* instruction:

Now, a member of a conspiracy who commits another crime during the existence or life of a conspiracy and commits this other crime in order to further or somehow advance the goals or objectives of the conspiracy, may be found by you to be acting as the agent of the other members of the conspiracy. The illegal actions of this person in committing this other crime may be attributed to other individuals who are then members of the conspiracy.

Under certain conditions, therefore, a defendant may be found guilty of this other crime even though he or she did not participate directly in the acts constituting the offense.

If you find that the Government has proven a defendant guilty of conspiracy as charged in count one of the indictment, you may also find him guilty of the crimes alleged in any other counts of the indictment in which he is charged provided you find that the essential elements of these counts as defined in these instructions have been established beyond a reasonable doubt.

And further, that you also find beyond a reasonable doubt that, one, the substantive offense of mail fraud, wire fraud, interstate transportation of money taken by fraud, and tax fraud were committed by a member of the conspiracy.

Two, the substantive crime was committed during the existence or life of and in furtherance of the goals of the conspiracy.

And third, that at the time this offense was committed the defendant was a member of the conspiracy.

Id. at 1577-79.

After the district court charged the jury, it sent the jury out so that the parties could raise objections to any

of the jury instructions. At this time, the appellants objected to the district court's failure to include the "reasonably foreseeable" language as part of its *Pinkerton* instruction. The district court, however, overruled their objection, stating that the jury had been "sufficiently instructed." *Id.* at 1608.

On appeal, the appellants contend that the district court's *Pinkerton* instruction did not adequately convey the principles necessary to support a conviction under the *Pinkerton* doctrine. Specifically, they argue that the district court should have instructed the jury that one conspirator cannot be found guilty for the acts of another conspirator unless the first conspirator could *reasonably foresee* the acts of the second conspirator. They allege that the "reasonably foreseeable" language is an essential element for holding a conspirator liable for the acts of another conspirator. We review the district court's decision to omit the "reasonably foreseeable" language from its *Pinkerton* instruction for an abuse of discretion. *United States v. Abbas*, 74 F.3d 506, 513 (4th Cir.) ("The decision of whether to give a jury instruction and the content of an instruction are reviewed for an abuse of discretion."), *cert. denied*, —— U.S. ——, 116 S.Ct. 1868, 134 L.Ed.2d 965 (1996).

The appellants' argument is foreclosed by our decision in *United States v Chorman*, 910 F.2d 102 (4th Cir. 1990). *But see United States v. Turcks*, 41 F.3d 893, 897 (3d Cir.1994) (stating "pursuant to our jurisprudence, a jury must find that a party to the conspiracy committed a crime both 'in furtherance of' *and* 'as a foreseeable consequence of the conspiracy to find a co-conspirator guilty of a substantive offense committed by a co-conspirator") (quoting *Pinkerton*, 328 U.S. at 646, 66 S.Ct. at 1183-84), *cert. denied*, —— U.S. ——, 115 S.Ct. 1716, 131 L.Ed.2d 575 (1995).

In *Chorman*, the defendants had been indicted on conspiracy and various substantive counts arising from their

involvement in an automobile "salvage/switch" operation. We affirmed the defendants' convictions for conspiracy and for the substantive offenses, in particular their convictions for knowingly removing or tampering with the vehicle identification numbers (VINs) of ten vehicles in violation of 18 U.S.C. 511(a). "In a salvage/switch operation, the public vehicle identification number (VIN) from a salvage auto . . . is removed from the dashboard of the auto." 910 F.2d at 104. One then obtains new title for the salvage auto, after the car is allegedly made roadworthy. Next, a car resembling the salvaged car is stolen, or otherwise obtained, and the stolen car's VIN number is replaced with the salvaged car's VIN number. Finally, the stolen car is sold as a legitimate used car with the new title. *Id.*

On appeal, the defendants in *Chorman* argued "that the government presented no evidence that either appellant stole, possessed, or transported any stolen vehicle identified in the indictment, or tampered with the VIN of any vehicle identified in the indictment." *Id.* at 108. And anticipating the government's reliance upon *Pinkerton* to sustain their convictions on the substantive counts, they also claimed that the district court did not give a proper *Pinkeron* instruction. *Id.* at 108-09.

The *Pinkerton* instruction at issue in *Chorman* was as follows:

> Whenever it appears beyond a reasonable doubt from the evidence in the case that a conspiracy existed and that a defendant was one of the members, then the statements thereafter knowingly made and the acts thereafter knowingly done by any person likewise found to be a member may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the statements and the acts may have occurred in the absence of and without the knowledge of the defend-

> ant, provided such statements and acts were knowingly made and done during the continuance of such conspiracy and in furtherance of some object or purpose of the conspiracy.

Id. at 107.

We stated that it was necessary to determine whether the district court's *Pinkerton* instruction was correct because the "[p]roper application of the *Pinkerton* theory depends on appropriate instructions to the jury." *Id.* at 111. Although we stated that "the instructions approved in some other circuits have the virtue of concretely stating the *Pinkerton* rule that a conspirator may be convicted of substantive offenses committed by coconspirators in the course of and in furtherance of the conspiracy," we concluded that the district court's *Pinkerton* instruction "adequately expressed the *Pinkerton* principle." *Id.*

Significantly, as in the instant case, the *Pinkerton* instruction in *Chorman* did not use the "reasonably foreseeable" language. And, even though we noted that the coconspirator's obliteration of the salvage VINs on the stolen vehicles may not have been anticipated by the defendants, we affirmed their convictions for violating 18 U.S.C. § 511(a) under *Pinkerton* because the coconspirator's tampering with the VINs was in furtherance of the conspiracy. *Id.* at 112.

We conclude that *Chorman* is dispositive of the appellants' argument concerning the *Pinkerton* instruction here. Because *Chorman* found a *Pinkerton* instruction that omitted the "reasonably foreseeable" language correct and the instruction in this case is not qualitatively different from the instruction in *Chorman*, we conclude that the *Pinkerton* instruction here was proper *See also United States v. Vasquez*, 858 F.2d 1387, 1393 (9th Cir.1988) (concluding that an instruction nearly identical to the one given by the district court here was a valid *Pinkerton* instruction), *cert. denied*, 488 U.S. 1034, 109 S.Ct. 847,

102 L.Ed.2d 978 (1989); *Manzella*, 791 F.2d at 1268 (stating that a *Pinkerton* instruction which was nearly identical to the instruction given by the district court here "contain[ed] every element of the *Pinkerton* doctrine, arrayed in an order calculated to maximize the likelihood that the jury will grasp this complicated concept"). Accordingly, the district court did not abuse its discretion in omitting the "reasonably foreseeable" language from the *Pinkerton* instruction.

B

The second jury instruction that the appellants take issue with concerns the district court's instruction on the elements necessary for conviction under I.R.C. §§ 7206(1) and 7206(2).

The appellants were convicted of numerous counts of filing false tax returns in violation of I.R.C. § 7206(1). A person is guilty of a felony under this section if the person:

> Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that is made under penalties of perjury, and which he does not believe to be true and correct as to every material matter.

To obtain a conviction under I.R.C. § 7206(1), the government must prove the following elements beyond a reasonable doubt: (1) the defendant made and subscribed to a tax return containing a written declaration; (2) the tax return was made under penalties of perjury; (3) the defendant did not believe the return to be true and correct as to every material matter; and (4) the defendant acted willfully. *United States v. Owen*, 15 F.3d 1528, 1532 (10th Cir.1994).

Aramony and Merlo were also convicted of numerous counts of aiding and assisting the filing of false tax

returns in violation of I.R.C. § 7206(2).[7] A person is guilty of a felony under this section if the person:

> Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document.

To obtain a conviction under I.R.C. § 7206(2), the government must prove the following elements beyond a reasonable doubt: "(1) the defendant aided, assisted, or otherwise caused the preparation and presentation of a return; (2) that the return was fraudulent or false as to a material matter; and (3) the act of the defendant was willful." *United States v. Salerno*, 902 F.2d 1429, 1432 (9th Cir.1990).

It is undisputed that the materiality of the false returns is an element of both I.R.C. §§ 7206(1) and 7206(2).[8] Prior to the trial, the appellants submitted a proposed jury instruction on materiality to the district court. Moreover, they also objected to the government's contention that the question of materiality was one of law for the court to decide, rather than a question of fact for the jury to decide.

During its charge to the jury, the district court gave the following instruction on materiality:

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[7] The jury acquitted Paulachak of the counts alleging a violation of I.R.C. § 7206(2).

[8] We have previously found that cases involving materiality under I.R.C. §§ 7206(1) and 7206(2) are interchangeable. *United States v. Rogers*, 853 F.2d 249, 251 n. 2 (4th Cir.), *cert. denied*, 488 U.S. 946, 109 S.Ct. 375, 102 L.Ed.2d 364 (1988).

> Concerning the second element, I would instruct you that a false deduction on a tax return is a material item. Similarly, income admitted [sic] from a tax return is a material matter

(J.A. 1587-88).

Following the district court's jury charge, the appellants objected to the district court's failure to submit the question of materiality to the jury. The district court, however, overruled their objection, stating that the jury had been "properly instructed." *Id.* at 1613.

Additionally, the appellants requested that the district court instruct the jury on the second and third elements of § 7206(2) because they did not believe that the district court had instructed the jury on those elements. In response to the appellants' request, the government stated to the district court that:

> Your Honor, my recollection is yesterday we discussed the fact that there was overlap in the willfulness instructions in the materiality—Or the materiality aspect of the instruction. Those elements are the same for both tax counts. So, when you gave the instruction and defined all three elements, you covered the other two elements of the second offense. My recollection is the Court decided to do that because there was no need to be repetitive.

Id. at 1617. The district court accepted the government's argument and refused to give an additional instruction to the jury on the second and third elements of § 7206(2), stating "I think that has been covered." *Id.*

The district court's decision not to submit the question of materiality to the jury was in accordance with the controlling precedent at the time of the trial. *See Rogers,* 853 F.2d at 251. But after the trial of this case, the Supreme Court decided *United States v. Gaudin,* —— U.S. ——, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995),

which held that the issue of materiality under 18 US.C. § 1001 must be submitted to the jury. The Court reasoned that:

> The Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged; one of the elements in the present case is materiality; respondent therefore had a right to have the jury decide materiality.

Id. at ——, 115 S.Ct. at 2314. In light of *Gaudin*, the appellants moved for a new trial on their convictions under I.R.C. §§ 7206(1) and 7206(2), but the district court denied their motions. On appeal, the appellants contend that their convictions under I.R.C. §§ 7206(1) and 7206(2) should be reversed because the district court directed a verdict for the government on the issue of materiality. Because this issue asks whether the district court correctly instructed the jury on the statutory elements necessary for conviction under I.R.C. §§ 7206(1) and 7206(2), our review is *de novo. United States v. Fiel*, 35 F.3d 997, 1005 (4th Cir.1994) ("The elements of a statutory offense upon which the court must instruct the jury involve questions of law subject to de novo review."), *cert. denied*, —— U.S. ——, 115 S.Ct. 1160, 130 L.Ed.2d 1116 (1995).

The government essentially makes a three-pronged argument in response: (1) *Gaudin* does not apply to prosecutions under I.R.C. § 7206;[9] (2) assuming *Gaudin* applies to prosecutions under I.R.C. § 7206, the district

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[9] *Compare United States v. Klausner*, 80 F.3d 55, 60-61 (2d Cir. 1996) (concluding that *Gaudin* does not apply to prosecutions under I.R.C. § 7206 because the determination of materiality was a pure question of law), *with United States v. McGuire*, 79 F.3d 1396, 1401 (5th Cir.1996) (concluding that "*Gaudin* makes it error for the district court to fail to submit the issue of materiality to the jury"), *and United States v. DiRico*, 78 F.3d 732, 735-36 (1st Cir.1996) (same).

court's instruction on materiality applied only to the counts alleging a violation of I.R.C. § 7206(1); and (3) in any event, the district court's alleged error is harmless beyond a reasonable doubt.

We need not address the government's first two arguments because we find its third argument to be dispositive of this issue. Thus, for purposes of this opinion, we will assume that *Gaudin* requires the jury to make a finding that the appellants' tax returns were fraudulent or false as to a material matter. Assuming the jury was required to make a finding on the materiality element of I.R.C. §§ 7206(1) and 7206(2), the district court's instruction violated the appellants' Fifth and Sixth Amendment rights to have a jury make every factual finding essential to their convictions because the district court's instruction conclusively established that the government had satisfied an element of the offense. *See Gaudin*, —— U.S. at ——, 115 S.Ct. at 2313; *United States v. Johnson*, 71 F.3d 139, 142-43 (4th Cir 1995) (finding the district court's instruction to the jury that deprived it of the opportunity to make a factual finding on an element of the offense constituted Sixth Amendment violation).

The government's harmless-error argument rests on the proposition that the error, which we are assuming occurred, was harmless because the jury made an independent finding as to the materiality element. The government points out that in instructing the jury, the district court stated that "[i]t is necessary only that the government prove beyond a reasonable doubt that the income was overstated by some substantial amount." (J.A. 1588). According to the government, this instruction allowed the jury to make an equivalent finding to the materiality element. Therefore, the government argues that the error in the materiality instruction was harmless.

Under certain circumstances, the failure to instruct the jury on an essential element of an offense can be harmless

error. Indeed, we found the district court's failure to instruct on an element of an offense harmless in *United States v. Forbes*, 64 F.3d 928, 934-35 (4th Cir.1995). In *Forbes*, Forbes had been convicted of two counts of knowingly making a false statement in order to purchase a firearm, *see* 18 US.C. § 922(a)(6), and two counts of receiving a firearm while under indictment. *See* 18 U.S.C. § 922(n). With respect to the two counts charging Forbes with receiving a firearm while under indictment, the district court refused to instruct the jury, as Forbes had requested, that in order to find him guilty, the jury had to find that he knew he was under indictment when he received the firearm. 64 F.3d at 932. On appeal, Forbes contended the district court's refusal to give his requested instruction amounted to constitutional error. We agreed, but held the error was harmless. In reaching this conclusion, we stated that:

> In returning verdicts of guilty on the § 922(a)(6) counts, Forbes' jury found beyond a reasonable doubt that he knew his statement—"I am not under indictment"—was false. It could not possibly have made this finding without also finding that he knew the truth—he was under indictment. Inasmuch as this latter finding is all that the missing instruction would have called for, we can be certain that the error was harmless.

Id. at 935. Although the jury did not make the necessary finding (knowledge of indicted status) in its consideration of the § 922(n) counts, the error in *Forbes* was amenable to harmless-error analysis because the jury did make the *identical* finding in its consideration of the § 922(a)(6) counts.

Building on *Forbes*, in *Johnson*, we concluded that we were precluded from applying harmless-error analysis to the district court's instruction conclusively establishing an element of the offense. 71 F.3d at 145. Johnson had been

convicted of one count of armed credit union robbery, *see* 18 U.S.C. § 2113(a), (d) and § 2, and one count of using a firearm during and in relation to a crime of violence. *See* 18 U.S.C. § 924(c)(1) and § 2. With respect to the armed credit union robbery count, the district court instructed the jury, over Johnson's objection, that the Arlington Schools Federal Credit Union was "a credit union within the terms of the statute." 71 F.3d at 141. On appeal, Johnson contended that the district court's conclusive instruction on this element of the offense constituted constitutional error. We agreed, but unlike *Forbes*, held that the district court's error was not subject to harmless-error analysis, stating that:

> Here, unlike *Forbes*, the jury was not given another instruction under which it could have made a finding that would, in effect, have been the same as finding the ASFCU was federally insured, and, for that reason, harmless error review is inappropriate.

Id. at 145.

Forbes and *Johnson* teach us that the application of harmless-error analysis to errors involving the failure to instruct or the giving of a conclusive instruction on an element of the crime is appropriate where the jury has made an independent finding on the equivalent or identical element of the crime. Therefore, the question here is whether the district court's instruction on "substantiality" allowed the jury to make an independent finding of materiality.

We conclude that the district court's instruction on substantiality allowed the jury to make an independent finding of materiality. "Under § 7206(1) the test of materiality is whether a particular item must be reported 'in order that the taxpayer estimate and compute his tax correctly.'" *United States v. Null*, 415 F.2d 1178, 1181 (4th Cir.1969) (quoting *United States v. Rayor*, 204 F.Supp. 486, 491 (S.D.Cal.1962)). This test is broader

than the test for substantiality. *See United States v. Helmsley*, 941 F.2d 71, 92 (2d Cir. 1991) ("False statements about income do not have to involve substantial amounts in order to violate [I.R.C. § 7206(1)]."), *cert. denied*, 502 U.S. 1091, 112 S.Ct. 1162, 117 L.Ed.2d 409 (1992).

The broadness of the test for materiality is demonstrated by *United States v. Greenberg*, 735 F.2d 29 (2d Cir.1984). In *Greenberg*, the court upheld the defendant's conviction under I.R.C. § 7206(1) based upon his overstating his wife's income while understating his income, even though this misallocation of income produced a tax deficiency of only forty-eight dollars. The court reasoned:

> The purpose of § 7206(1) is not simply to ensure that the taxpayer pay the proper amount of taxes—though that is surely one of its goals. Rather, that section is intended to ensure also that the taxpayer not make mistatements that could hinder the [IRS] in carrying out such functions as the verification of the accuracy of that return or a related tax return.

Id. at 31. Thus, it is clear that a finding of materiality does not depend upon the amount of the unpaid tax. *See, e.g., United States v. Holland*, 880 F.2d 1091, 1096 (9th Cir.1989) (stating that "any failure to report income is material"); *United States v. Young*, 804 F.2d 116, 119 (8th Cir.1986) (concluding that the omission of information necessary to compute income is material), *cert. denied*, 482 U.S. 913, 107 S.Ct. 3184, 96 L.Ed.2d 673 (1987); *United States v. Gaines*, 690 F.2d 849, 858 & n. 16 (11th Cir.1982) (stating that in a prosecution under § 7206(1) "the amounts of the misstatements were legally irrelevant"); *United States v. Hedman*, 630 F.2d 1184, 1196 (7th Cir.1980) (stating that "false statements relating to gross income, irrespective of the amount, constitute a material misstatement in violation of Section 7206(1)"), *cert. denied*, 450 U.S. 965, 101 S.Ct. 1481, 67 L.Ed.2d 614 (1981).

Here, the district court's instructions required the jury to find that the appellants made false deductions, understated their income, and did so in a substantial manner. Because the test of materiality is broader than the test for substantiality, the jury's independent finding of substantiality necessarily included a finding of materiality. Because the jury made an independent finding of materiality, any error in the district court's failure to instruct on materiality was harmless beyond a reasonable doubt.

C

The last jury instruction that Aramony and Merlo take issue with concerns the district court's instruction on the elements necessary for conviction under 18 U.S.C. § 1957. Aramony was convicted of two counts, and Merlo three, under § 1957.[10]

Section 1957(a) provides, in relevant part, that: "Whoever . . . knowingly engages or attempts to engage in a *monetary transaction* in criminally derived property that is of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished . . . ." (emphasis added). Congress has defined the term "monetary transaction" for purposes of § 1957 as "the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument, (as defined in section 1956(c)(5) of this title) by, through, or to a financial institution (as defined in section 1956 of this title). . . ." 18 U.S.C. § 1957(f)(1).

Before the trial, Aramony and Merlo objected to the government's proposed instruction concerning whether the government had to prove an effect on interstate commerce. Specifically, they stated that "the government must show some effect on interstate commerce." (J.A. 584). In in-

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[10]Paulachak was not charged with any violations of 18 U.S.C. § 1957.

structing the jury on the elements of § 1957, the district court stated:

> *It is not necessary for the Government to show* that the defendant actually intended or anticipated an effect on foreign or interstate commerce or *that commerce was actually affected.* All that is necessary is that the natural and probable consequences of the defendant's action would be to affect interstate or for [sic] foreign commerce no matter how minimal.

Id. at 1585 (emphasis added).

Following the district court's jury charge, Aramony and Merlo objected to the district court's failure to instruct the jury that it had to make a finding that Aramony's and Merlo's activities had affected interstate commerce. The district court rejected this contention, concluding that the jury was properly instructed. As with the materiality issue, we review the district court's instruction *de novo* because Aramony and Merlo contend that the district court incorrectly instructed the jury on the statutory elements necessary for conviction under 18 U.S.C. § 1957. *Fiel,* 35 F.3d at 1005.

On appeal, Aramony and Merlo seek reversal of their § 1957 convictions on the ground that the district court violated their rights under the Fifth and Sixth Amendments to have a jury make every factual finding essential to their conviction by instructing the jury that it did not need to find that their actions had actually affected interstate commerce. According to Aramony and Merlo, the finding of at least a minimal effect on interstate commerce is an essential element that the government must prove beyond a reasonable doubt in order to convict a defendant of violating § 1957.

The government admits that an effect on interstate commerce is an element of a § 1957 offense. Nonetheless, the government argues that the jury did not have to make a finding that the acts of Aramony and Merlo had an effect

on interstate commerce because that element is not an *essential* element of the crime. *See United States v. Kelley*, 929 F.2d 582, 586 (10th Cir.) ("The requirement that the transaction be 'in or affecting interstate commerce' must be met in order to confer jurisdiction on federal courts. Such, however, is not an essential element of the crime charged."), *cert. denied*, 502 U.S. 926, 112 S.Ct. 341, 116 L.Ed.2d 280 (1991); *cf. United States v. Feola*, 420 U.S. 671, 676 n. 9, 95 S.Ct. 1255, 1260 n. 9, 43 L.Ed.2d 541 (1975) ("Labeling a requirement 'jurisdictional' does not necessarily mean, of course, that the requirement is not an element of the offense.").

Although our circuit precedent does not specifically answer whether an effect on interstate commerce is an essential element of a § 1957 violation, it does answer a nearly indistinguishable question in the affirmative. In *United States v. Peay*, we concluded that proof of a *de minimis* effect on interstate commerce is essential to show a violation of 18 U.S.C. § 1956. 972 F.2d 71, 74 (4th Cir. 1992), *cert. denied*, 506 U.S. 1071, 113 S.Ct. 1027, 122 L.Ed.2d 172 (1993). We cannot conceive of a rational reason to hold differently in the context of § 1957, which is "the sister provision of 18 U.S.C. § 1956." *United States v. Wynn*, 61 F.3d 921, 926 (D.C.Cir.), *cert. denied*, —— U.S. ——, 116 S.Ct. 578, 133 L.Ed2d 501 (1995). Accordingly, we hold a *de minimis* effect on interstate commerce is an essential element of a § 1957 violation.

This conclusion is bolstered by the Supreme Court's decision in *Gaudin*. In *Gaudin*, the Court made it clear that under the Fifth and Sixth Amendments "criminal convictions [must] rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." —— U.S. at ——, 115 S.Ct. at 2313. A criminal defendant's right to demand that a jury find him guilty of all the elements of the crime with which he is charged includes having the jury decide mixed questions of law and fact.

Id. at ——, 115 S.Ct. at 2314-16. In particular, the Court explained:

> Deciding whether a statement is "material" requires the determination of at least two subsidiary questions of purely historical fact: (a) "what statement was made?"; and (b) "what decision was the agency trying to make?". The ultimate question: (c) "whether the statement was material to the decision," requires applying the legal standard of materiality (quoted above) to these historical facts.

Id. at ——, 115 S.Ct. at 2314. Significantly, the Court in *Gaudin* concluded that not only questions (a) and (b) were to be determined by the jury but that question (c) was also to be determined by the jury.

In this case, we are faced with a similar situation. The jury was required to determine a question of historical fact: Did Aramony and Merlo engage in a monetary transaction that involved criminally derived property having a value greater than $10,000? The ultimate question, at least for present purposes, is whether such activities would affect interstate commerce. Because the answer to the ultimate question involves an application of the law to the facts, the jury was required to make a finding on the interstate commerce element. *See Peay*, 972 F.2d at 74 (stating that "[p]roof of some effect on interstate commerce is essential to show" a violation of 18 U.S.C. § 1956).

The district court's instruction did not require the jury to make a finding on the interstate commerce element. Because this is an essential element of the crime, the district court's instruction stating otherwise constituted a failure to instruct the jury on an essential element necessary for a conviction under § 1957. Therefore, the district court's instruction was at constitutional error. *See Forbes*, 64 F.3d at 934.

Despite the erroneous instruction, the government ar gues that we should affirm the convictions of Aramony

and Merlo under § 1957, contending that the error in the district court's instruction was harmless. Under certain circumstances, the type of error involved here is harmless. *See Johnson*, 71 F.3d at 144. For example, if a jury is erroneously instructed that a mandatory presumption arose as to one element if it found certain predicate facts, but "'no rational jury could find the predicate acts but fail to find the fact presumed,'" *id.* (quoting *Carella v. California*, 491 U.S. 263, 267, 109 S.Ct. 2419, 2421-22, 105 L.Ed.2d 218 (1989) (*per curiam*)), then the error is harmless. Another example is when the reviewing court can be satisfied that the jury actually made an equivalent or identical finding pursuant to another instruction. *See Forbes*, 64 F.3d at 935.

Because neither of these situations is present here, the error in the district court's instruction is not amenable to harmless-error analysis. *See Johnson*, 71 F.3d at 142-144. Consideration of the instruction given to the jury reveals that the jury simply did not make an independent finding that the actions of Aramony and Merlo as charged in the § 1957 counts had a *de minimis* effect on interstate commerce. A finding that the natural and probable consequences of their actions would be to affect interstate or foreign commerce is not an equivalent or identical finding. Furthermore, the fact that the jury was presented with evidence that each conviction involved a substantial check that had actually traveled in interstate commerce is of no moment. A verdict of guilty must rest on an actual jury finding of guilty. *See Sullivan v. Louisiana*, 508 U.S. 275, 279-81, 113 S.Ct. 2078, 2082, 124 L.Ed.2d 182 (1993). Speculation about the probable finding that the jury would have made in view of the evidence before it had it been properly instructed does not satisfy this requirement. *Id.*

The error here is completely analogous to the error that we held required reversal of the defendant's convictions for armed credit union robbery and using a firearm during and in relation to a crime of violence in *Johnson*. Like

the instant case, the jury in *Johnson* did not make a finding on an essential element of the crime—the federally insured status of the credit union. There, the district court had conclusively instructed the jury that the credit union at issue constituted a federally insured credit union within the terms of the applicable statute. Despite the overwhelming evidence of the federally insured status of the credit union that was before the jury, we reversed because the jury did not actually make the required finding.

In sum, we hold that the district court erred by instructing the jury that it did not have to find that the actions of Aramony and Merlo as charged in the § 1957 counts had a *de minimis* effect on interstate commerce. Furthermore, we hold the error is not subject to harmless error analysis. Accordingly, we vacate the convictions of Aramony and Merlo for engaging in the interstate transportation of fraudulently acquired property.[11]

IV

The last issue worthy of extended discussion is Aramony's contention that all of his convictions should be reversed because the district court admitted into evidence communications that were allegedly protected by either the attorney-client privilege or a joint defense privilege that he shared with UWA.

A

In late 1991, Aramony learned that two reporters from the *Washington Post* were conducting an investigation into alleged improprieties and irregularities in the governance of the UWA. Soon thereafter, UWA hired Investigative Group, Inc. (IGI) to conduct an internal investigation. IGI's preliminary findings were delivered to the UWA Board of Governors in January 1992. On Febru-

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[11] Because the forfeiture order is predicated on these convictions, we vacate the forfeiture order as to Aramory and Merlo as well.

ary 4, 1992, UWA retained a law firm, Verner, Liipfert, to aid in the investigation then under way and to render legal advice concerning UWA's response to any negative publicity that might arise from the *Washington Post* investigation. On February 19, 1992, the *Washington Post* published a front page article charging top management of UWA with mismanagement, cronyism, excessive compensation, and misuse of funds for personal reasons.

Aramony's claim of attorney-client privilege falls into two categories. The first category is his communication with Lisle Carter and the IGI investigators. Lisle Carter was the General Counsel of UWA from 1988 to 1991. Aramony had known him for approximately thirty years. During this time, Aramony states that he had turned to Carter "from time to time for personal advice of both a legal and non-legal nature, and [he] confided personal matters to [Carter]." (Sealed Joint Appendix (S.J.A.) 373). When the *Washington Post* began its investigation into the allegations concerning Aramony, Aramony states that he turned to "Carter for legal advice on how to deal with the press inquiries and related problems." *Id.* at 374. Aramony further states that he "understood and believed that [Carter] represented both UWA and [him] with respect to those inquiries." *Id.* at 375-76.

Aramony further claims that he had a reasonable belief that his statements to the IGI investigators were also protected by his relationship with Carter. In response to the *Washington Post*'s investigation and on the advice of a public relations firm, Carter hired IGI to examine the allegations concerning Aramony. Specifically, Aramony claims that Carter hired IGI to assist him in rendering advice to UWA and Aramony. In particular, Aramony states that "Mr. Carter—my friend and counsel—had urged me to be candid with the [IGI] investigators. I would not have made many of the disclosures that I made in the IGI interviews if I had been warned that my communications with IGI could be revealed outside UWA without my consent and to my detriment." *Id.* at 375.

The second category of privileged communications is Aramony's communications with lawyers from Verner, Liipfert. Specifically, Aramony claims that he was a client of Berl Bernhard and James Hibey, who were partners at Verner, Liipfert. To support this contention, Aramony produced the affidavit of Gail Manza, a woman who had a personal relationship with Aramony and was a vice president of UWA, and the affidavit of Thomas Boggs, Jr., the attorney who assisted Aramony in severing his ties with UWA. The pertinent part of Manza's affidavit states the following:

> I asked Mr. Bernard who he would represent if UWA and Mr. Aramony came to a parting of the ways. Mr. Bernhard said that he would represent Mr. Aramony. Mr. Hibey indicated his agreement with Mr. Bernhard's statement. . . . After the meeting was over, Mr. Hibey put his arm around Mr. Aramony's shoulders and said words to the effect, "Don't worry, Bill. We'll take care of you."

Id. at 383-84.

Boggs' affidavit recounted a conversation that he had with Bernhard. The pertinent part of his affidavit stated: "In the course of our preliminary discussions, Mr. Bernhard stated that he had decided that he and his firm could not continue to represent both the United Way board and Mr. Aramony." *Id.* at 394.

Aramony does not specify what communications Verner, Liipfert allegedly made in violation of the attorney-client privilege. But Aramony's chief concern seems to be the documents that Verner, Liipfert produced to the government pursuant to a subpoena duces tecum. This production occurred in June 1992. Hibey sent Boggs a letter in June 1992 stating that the government had subpoenaed the documents and that UWA was going to produce them. But neither Boggs nor Aramony raised the attorney-client privilege prior to UWA's complying with the subpoena.

During pretrial motions, Aramony raised for the first time the question of the existence of the attorney-client privilege. Based upon his affidavit and the affidavits of Manza and Boggs, Aramony moved for an evidentiary hearing to determine whether an attorney-client relationship existed between himself and Carter and Verner, Liipfert. The district court denied Aramony's motion, stating "I find from the submissions and the affidavits presented that there isn't a sufficient issue presented that would necessitate any kind of evidentiary hearing." (J.A. 335).

Aramony appealed the district court's decision, seeking a writ of mandamus requiring the district court to conduct an evidentiary hearing. We dismissed Aramony's appeal "without prejudice to [his] right to raise the attorney-client privilege during the course of the trial." *Id.* at 525.

The attorney-client privilege is "the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 682, 66 L.Ed.2d 584 (1981). The privilege protects "not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Id.* at 390, 101 S.Ct. at 683. The purpose of the privilege is "to encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Id.* at 389, 101 S.Ct. at 682. But the attorney-client privilege interferes with "the truthseeking mission of the legal process," *United States v. Tedder*, 801 F.2d 1437, 1441 (4th Cir. 1986), *cert. denied*, 480 U.S. 938, 107 S.Ct. 1585, 94 L.Ed.2d 775 (1987), because it "is in derogation of the public's right to every man's evidence." *In re Grand Jury Proceedings*, 727 F.2d 1352, 1355 (4th Cir.1984) (internal quotation marks omitted). Thus, the privilege "is not favored by federal courts" and "is to be strictly

confined within the narrowest possible limits consistent with the logic of its principle." *Id.* (footnote and internal quotation marks omitted).

"The district court's conclusions as to the non-existence of any attorney-client privilege and expectation of confidentiality rest essentially on determinations of fact, which we review for clear error." *Sheet Metal Workers Int'l Ass'n v. Sweeney*, 29 F.3d 120, 123 (4th Cir.1994). Furthermore, the party claiming the privilege carries the burden of demonstrating that: (1) the attorney-client privilege applies; (2) the communications were protected by the privilege; and (3) the privilege was not waived. *Id.* at 125. Finally, "the expectation of confidentiality applies to the attorney as well as the client," *id.;* indeed, "we have adopted [the] view . . . that the'essence' of the privilege is the protection of what was 'expressly made confidential' or should have been 'reasonably assume[d] . . . *by the attorney as so intended.*'" *Id.* (first alteration and ellipsis added) (emphasis added by *Sweeney*) (quoting *In re Grand Jury Proceedings*, 727 F.2d at 1355-56).

Aramony contends that his communications with Lisle Carter and the IGI investigators and his communications with the lawyers from Verner, Liipfert were protected by the attorney-client privilege. We shall address these contentions in turn.[12]

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[12] We find no merits to Aramony's argument that the district court erred in refusing to hold an evidentiary hearing. Aramony contends that the district court should have conducted an evidentiary hearing because of the conflict in the parties' evidence. Because the district court failed to hold such a hearing, Aramony reasons that we must remand this case to the district court for the holding of such a hearing. This argument is foreclosed by our decision in *Sweeney*. In *Sweeney*, we stated that "[t]he district court's conclusions as to the non-existence of any attorney-client privilege" are reviewed for "clear error." 29 F.3d at 123. This was so even though the district court had based its findings largely upon the parties' conflicting affidavits. In particular, we stated that

> if the affidavit of Sweeney is viewed most favorably to him, perhaps he might succeed in his claims; but if the affidavits

1

With respect to Aramony's communications with Carter and the IGI investigators, in response to Aramony's motion for an evidentiary hearing, the government submitted an affidavit from Carter. Carter's affidavit shows that he did not believe that any of Aramony's communications to him were to be confidential because he did not believe that Aramony was seeking his legal advice.

In his affidavit, Carter states that "[a]t all times during the course of my employment at UWA, my sole and exclusive client was UWA. At no time during my employment at UWA, or subsequent to my employment at UWA, did I provide personal legal representation to William Aramony ("Aramony"), who was president of UWA during the course of my employment." (J.A. 279). Carter further states that "[a]t no time during my employment at UWA did Aramony express to me any confusion or misunderstanding . . . as to my position as UWA's—not Aramony's—attorney. In fact, on two occasions during my employment at UWA, I referred Aramony to outside counsel to provide him personal legal representations." *Id.* at 280. Accordingly, Carter's affidavit demonstrates that he did not believe that any of Aramony's communications

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and depositions of [the others] are taken at face value, there is little doubt that Sweeney might not prevail. In such a case, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous" and "this is so even where the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts."

Id. at 126 (citation omitted) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 574, 105 S.Ct. 1504, 1511-12, 84 L.Ed.2d 518 (1985)). Because the affidavits submitted by the government and the testimony of the government's witnesses, when taken at face value, reveal there was no chance Aramony would prevail on his claim, the district court did not err when it refused to hold an evidentiary hearing.

to him were to be confidential because he did not believe that Aramony was seeking his legal advice.

The conclusion that Aramony was not seeking Carter's legal advice is supported by the testimony of Jeffrey Nason, a senior investigator at IGI. Nason's testimony shows that Aramony, himself, did not have a reasonable belief that any communications he made to IGI would be kept confidential.

First, Nason's testimony shows that Aramony may not have had a reasonable belief that IGI's report would be kept confidential. Nason testified that UWA did not make a decision on whether to make its report public until February 1992. But Nason testified that from the day Carter hired IGI there was discussion of making IGI's report public.

Second, Aramony's behavior arguably shows that he did not believe that his statements to IGI would be kept confidential. Specifically, we note that Nason testified that Aramony repeatedly lied to the IGI investigators. For example, when Nason questioned Aramony about his relationship with Villasor, Nason testified that Aramony responded by stating that "I didn't touch [that] little girl, it was companionship." *Id.* at 1320. Nason further testified that Aramony told him that he neither misused UWA money nor used business trips to facilitate personal trips. Nason's testimony shows that Aramony was not entirely candid with the IGI investigators.

In sum, the district court was not clearly erroneous in finding that Aramony's communications with Lisle Carter and the IGI investigators were unprotected by the attorney-client privilege.

2

We also conclude that the district court was not clearly erroneous in finding that Aramony's communications with the lawyers at Verner, Liipfert were unprotected by the attorney-client privilege.

In addition to claiming he was a client of Carter, Aramony alleged that he was a client of Berl Bernhard and James Hibey. As to this portion of Aramony's motion for an evidentiary hearing, the government presented affidavits from Bernhard, Hibey, and Boggs. These affidavits show that Bernhard and Hibey did not believe that any of Aramony's communications to them were to be confidential because they did not believe that Aramony was seeking their legal advice.

Bernhard's affidavit states that UWA retained Verner, Liipfert to represent it in connection with the investigation of the allegations concerning Aramony. His affidavit also states that "Aramony clearly understood that Verner Liipfert was being retained solely to represent UWA and had not been retained to represent Aramony." *Id.* at 286. Additionally, Bernhard denied telling Boggs that he represented Aramony, stating that "[a]fter Aramony retained Patton, Boggs & Blow, I had occasional contact with personnel of that firm. I do not recall any representative of that firm at any point ever suggesting or indicating to me confusion or misunderstanding as to the fact that Verner Liipfert solely and exclusively represented UWA from the time of its retention forward." *Id.* at 287. In particular, Bernhard states that "[a]t no time did I tell Boggs that I 'could no longer represent both UWA and Aramony.' I did not say this because I did not at any point represent Aramony. There was no attorney-client relationship between Verner Liipfert and Aramony in this matter." *Id.* at 288. Finally, Bernhard had no recollection of telling Manza that he would represent Aramony if UWA and Aramony came to a split. In his affidavit, Bernhard specifically states that "I have no recollection of having made the statement attributable to me and I do not believe I made such a statement. Nor do I recall Mr. Hibey 'indicat[ing] his agreement' to the alleged statement. Such a statement would have been inconsistent with the representation that Verner Liipfert had agreed to provide UWA." *Id.* at 287 (alteration in original).

The government also submitted an affidavit from Hibey. Hibey's affidavit does not explicitly take issue with Manza's claim that Hibey told Aramony "we'll take care of you." But it does state that "[a]t no time in my meetings or contacts with Aramony between late January, 1992 and early March, 1992 did I ever make a representation, directly or indirectly, to Aramony that Verner Liipfert or I represented him." *Id.* at 292.[13]

Finally, the government submitted a second affidavit from Boggs. In this affidavit, Boggs repudiated his earlier statement that Bernhard represented Aramony:

> My affidavit of October 28, 1994 has been used in a manner to imply something technical—namely, that Berl Bernhard told me he was representing both UWA and Bill Aramony. I was too casual in accepting language proposed to me by defense counsel for Bill Aramony. I had assumed that Bill Aramony and Verner Liipfert had been working together to defend UWA, but things had developed which caused Bill Aramony and UWA to be at odds.
>
> . . . . .
>
> In short, I wish to be clear that the language used in my prior affidavit was, from my standpoint, informally offered, but I recognize now that I should have been more precise and stated that Berl Bernhard did not tell me that he "represented" Bill Aramony, but did state that he represented UWA and was trying to help Bill Aramony find appropriate counsel

Id. at 276-77.

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[13] Unlike Carter, neither Bernard nor Hibey testified in the government's case against Aramony. But Aramony had the opportunity to call them as witnesses in his defense and to question them about their affidavits. Thus, Aramony cannot complain that he lacked an opportunity to test the affidavits of Bernhard and Hibey.

In addition to Bernhard's and Hibey's denials of having an attorney-client relationship with Aramony, an additional piece of evidence supports the district court's finding that Aramony was not their client. This piece of evidence is Aramony's reaction to the June 1992 letter that Hibey sent to Boggs, who at the time was Aramony's personal attorney, stating that UWA was going to produce various documents to the government in accordance with the government's subpoena Because the record is not adequately developed, we do not find that Aramony's failure to assert the attorney-client privilege at that time constituted a waiver of the privilege.

But we do find that Aramony's failure to assert the privilege in a timely manner is probative of whether Aramony intended for these documents to remain confidential. As Judge Friendly has aptly noted, "It is not asking too much to insist that if a client wishes to preserve the privilege under such circumstances, he must take some affirmative action to preserve confidentiality." *In re Horowitz,* 482 F.2d 72, 82 (2d Cir.), *cert. denied,* 414 U.S. 867, 94 S.Ct. 64, 38 L.Ed.2d 86 (1973). Because the " '[t]aking or failing to take precautions may be considered as bearing on intent,' " *In re Grand Jury Proceedings,* 727 F.2d at 1356 (quoting *In re Horowitz,* 482 F.2d at 82 n. 10), the district court was entitled to find that Aramony's complete failure to respond to Hibey's letter indicated that Aramony did not intend for these documents to remain confidential.

In sum, we conclude that the district court was not clearly erroneous in finding that Aramony's communications with the lawyers at Verner, Liipfert were not protected by the attorney-client privilege. Like *Sweeney,* the district court here was confronted with conflicting affidavits, had additional evidence that supported its find-

ings, and had allowed the holder of the privilege an adequate opportunity to present his contentions.[14]

B

Aramony also contends that he had a joint defense privilege with UWA that protected against the disclosure of his communications with Carter, Nason, and the Verner, Liipfert attorneys.

The joint defense privilege, also known as the common interest rule, "has been described as an extension of the attorney client privilege." *United States v. Schwimmer*, 892 F.2d 237, 243, (2d Cir.1989) (internal quotation marks omitted). To be entitled to the protection of this privilege the parties must first share a common interest about a legal matter. *Sweeney*, 29 F.3d at 124. But it is unnecessary that there be actual litigation in progress for this privilege to apply. *Schwimmer*, 892 F.2d at 244.

Although the district court did not explicitly address this issue, we conclude that the joint defense privilege did not protect Aramony's communications with Carter, Nason, and the Verner, Liipfert attorneys because Aramony and UWA clearly did not share a common interest about a legal matter. Aramony, however, contends that he and "UWA pursued a common strategy with respect to the press inquiries and any potential litigation to which the press reports could give rise." (Appellants' Brief at 55). Specifically, he states that "[t]he common strategy included investigation of the allegations against

[14] We reach a similar conclusion as to Merlo's claim that the government obtained evidence in violation of the attorney-client privilege. Merlo had the burden of establishing the attorney client privilege, but Merlo, unlike Aramony, provided no support, such as affidavits, for his claim that the disputed communications were protected by the attorney-client privilege. Thus, the district court was entitled to find that he had not met his burden in establishing that these communications were protected by the attorney-client privilege.

Aramony; the development of defenses against those allegations; and the preparation of responses to questions about the allegations." *Id.*

The development of defenses to allegations against Aramony simply is not a legal matter concerning UWA. Although these defenses could help preserve UWA's reputation, the preservation of one's reputation is not a legal matter. If the allegations concerning Aramony could have subjected UWA to civil or criminal liability, Aramony's claim would be stronger. But, because Aramony has not shown how UWA would be affected (apart from the strain of its reputation) by the allegations concerning him, the joint defense privilege is inapplicable here.

V

The appellants also raise numerous other issues. We have reviewed these contentions and find no error committed by the district court affecting the appellants' substantial rights. *See* Fed.R.Crim. P. 52. Accordingly, for all the foregoing reasons, the appellants' convictions, except for Aramony's and Merlo's convictions based upon 18 U.S.C. § 1957, are affirmed. Because we are vacating the § 1957 convictions, we vacate the forfeiture order entered against Aramony and Merlo. We also vacate their sentences and remand for resentencing. But, as to Paulachak, we affirm his sentence.

No. 95-5532—*AFFIRMED IN PART, VACATED IN PART, AND REMANDED.*

No. 95-5553—*AFFIRMED.*

No. 95-5554—*AFFIRMED IN PART, VACATED IN PART, AND REMANDED.*

Filed August 13, 1996

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-5532
CR-94-373-A

UNITED STATES OF AMERICA,
Plaintiff-Appellee
v.

WILLIAM ARAMONY,
Defendant-Appellant

No. 95-5553
CR-94-373-A

UNITED STATES OF AMERICA,
Plaintiff-Appellee
v.

STEPHEN J. PAULACHAK,
Defendant-Appellant

No. 95-554
CR-94-373-A

UNITED STATES OF AMERICA,
Plaintiff-Appellee
v.

THOMAS J. MERLO,
Defendant-Appellant

ON PETITION FOR REHEARING WITH
SUGGESTION FOR REHEARING IN BANC

The appellants' petitions for rehearing and suggestions for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petitions for rehearing and is of the opinion that they should be denied,

IT IS ORDERED that the petitions for rehearing and suggestions for rehearing in banc are denied.

For the Court

/s/ Bert M. Montague
Clerk

Filed August 21, 1996

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-5532
CR-94-373-A

US

v.

ARAMOND

No. 95-5553
CR-94-373-A

US

v.

PAULACHAK

No. 95-554
CR-94-373-A

US

v.

MERLO

MANDATE

The judgment of this Court dated 7/17/96 takes effect today.

BERT M. MONTAGUE
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Criminal No. 94-373A

UNITED STATES OF AMERICA

v.

WILLIAM ARAMONY, STEPHEN PAULACHAK,
THOMAS MERLO, and THE PARTNERSHIP UMBRELLA, INC.,
Defendants.

ORDER

This matter came before the Court on various motions by the parties. For reasons stated from the bench, it is hereby

ORDERED

(1) defendant Merlo's motion to suppress the statements of John Hume is denied;

(2) defendant Merlo's motion for leave to file a motion out of time is granted and the motion to grant more than the usual number of peremptory strikes is denied;

(3) defendant Merlo's motion in limine to exclude all references to organized crime is moot;

(4) defendant Aramony's motion to compel the production of *Jencks* and *Giglio* materials is denied;

(5) defendant Aramony's renewed motion to exclude irrelevant and prejudicial evidence will be ruled on at time of trial;

(6) the government's motion to produce certain of defendant Aramony's medical records is denied;

(7) defendant Aramony's motion to compel the government to produce the names and addresses of physicians treating specific government witnesses is denied; and,

(8) defendant Partnership Umbrella, Inc.'s motion to compel discovery is denied.

/s/ Claude M. Hilton
United States District Judge

Alexandria, Virginia
February 24, 1995

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Cr. No. 94-373-A

UNITED STATES OF AMERICA

-vs-

WILLIAM ARAMONY and STEPHEN J. PAULACHAK and
THOMAS J. MERLO and
THE PARTNERSHIP UMBRELLA, INC.,
Defendants.

HEARING ON MOTIONS

January 6, 1995

Before: Claude M. Hilton, Judge

* * * *

[4] THE COURT: I don't mean to be frivolous, but I have spent a good part of the last two days going over these motions, which have been quite lengthy in the briefs and the response. I don't know whether it would come up three feet or not, but it seemed like it was close to it when I had it piled around my desk. And I don't feel the need of any further argument on a number of these motions, and I will give you my rulings to them.

The first motion I will deal with is Aramony's motion to suppress these attorney/client communications, which he alleges that lawyers were representing both he and the United Way. I find from the submissions and the affidavits presented that there isn't a sufficient issue presented that would necessitate any kind of an evidentiary hearing. The

affidavits presented by all of the lawyers in the case have stated that there was no attorney/client relationship. Mr. Boggs corrected the affidavit that he had presented initially that indicates he was not told of any attorney/client communications. And the motion to suppress communications and to disqualify Government personnel on those grounds will be denied.

* * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Cr. No. 94-373-A

UNITED STATES OF AMERICA

-vs-

WILLIAM ARAMONY and STEPHEN J. PAULACHAK and
THOMAS J. MERLO and
THE PARTNERSHIP UMBRELLA, INC.,
Defendants.

HEARING ON MOTIONS

February 24, 1995

Before: Claude M. Hilton, Judge

* * * *

[4] Now, Mr. Hume is available. He has not spoken to us about the substance of whether he was authorized to speak on Merlo's behalf. However, he did send us a copy of a letter which we have attached to our motion, our memorandum which he calls Mr. Heideman's accusation that Mr. Hume was not authorized to speak to us defamatory. Now, the second reason— And Mr. Hume is here in court to testify if the Court seeks his testimony.

* * * *

[6] THE COURT: Well, how does—The exclusionary rule really doesn't apply in this situation, does it?

MR. HEIDEMAN: Well, Your Honor, I believe it does because we have information that was imparted from a client to his attorney The attorney then allegedly im-

parted, based upon a discovery document the Government gave us in late December, the Government received that information and used that information. And that evidence, it seems to me, clearly should be suppressed in all respects. The exclusionary rule does apply because it was an unauthorized communication.

THE COURT: Okay. Well, your motion to suppress these statements will be denied. The only concern that I had when I looked at it was perhaps your motion might be well taken if the Government intended to use those statements in their case. They are not going to do so. It becomes moot. Your motion to suppress will be denied.

Now, what else do we have?

MR. BELLOWS: Your Honor, the Hume motion came up in the first place because the Government wanted to disclose to the defense attorneys a copy of Mr. Hume's memorandum—Not Mr. Hume's memorandum, but a memorandum we wrote to [7] ourselves based on what Mr. Hume said to us as potentially *Brady*. That's the only use that we had intended to use for which we notified the defense. I plan on doing that just in the performance of my duties as the Government prosecutor.

THE COURT: All right.

MR. HEIDEMAN: Your Honor, that's what brought all of this to our attention. And we believe that the disclosure was unauthorized. We believe that the contents of the Government's notes and the memorandum they provided to us is factually incorrect. We believe that it all should be covered by the privilege. We think the Government agrees it should be covered by the privilege, which is why they are saying they are not going to use it at trial. And we think that the disclosure of that inaccurate, incorrect and privileged information to anybody is a perpetuation of a disclosure that was originally unauthorized. And we think Your Honor should not permit that disclosure.

Thank you, Your Honor.

THE COURT: You don't think the Government ought to be permitted to give to your co-counsel that material which they think is *Brady* material?

MR. HEIDEMAN: We don't think it should be given to anybody because it was an unauthorized attorney/client privileged communication.

THE COURT: Do you-all agree that Mr. Bellows [8] shouldn't send that to you?

MR. CLINE: No, Your Honor, we don't agree with that.

MR. GUIDOBONI: No, sir, not on behalf of Mr. Paulachak.

THE COURT: All right. I have already ruled on this motion to suppress. And I believe—I will not prevent him from disseminating the material.

What other motions do we have here? We have one for additional peremptory strikes. I thought I had already ruled on that?

MR. HEIDEMAN: I don't have a ruling, Your Honor, on behalf of the defendant Merlo. We would request—We filed both a motion for leave to file and we filed a motion for additional peremtories.

THE COURT: I thought I had ruled in regard to another defendant, but your motion for additional peremptory strikes will be denied. I find that you will be able to pick a fair and impartial jury on the number of strikes that you-all have.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Criminal No. 94-373-A

UNITED STATES OF AMERICA

v.

WILLIAM ARAMONY, *et al.*,
Defendants.

WILLIAM ARAMONY'S SUPPLEMENTAL OBJECTIONS TO GOVERNMENT'S PROPOSED JURY INSTRUCTIONS

* * * *

6. Government's Proposed Jury Instruction No. 64: Aramony has a Sixth Amendment right to a jury determination on the issue of materiality. The government's proposed instruction improperly takes the issue of materiality away from the jury. In addition, the proposed instruction fails to define the term "material." *Compare* William Aramony's Proposed Jury Instruction No. 69.

7. Government's Proposed Jury Instruction No. 65: We object to the third paragraph of the proposed instruction. The indictment alleges that income was under-reported and deductions were overstated with respect to particular items and, in some cases, in particular amounts. The government must be bound by the charges returned by the grand jury. It is not free to prove under-reporting of income or overstating of deductions for items or in amounts other than those found by the grand jury. In addition, we object to the phrase "or caused to be made" in the definition of the term "fraudulent." The statute at

issue—26 U.S.C. § 7206(1)—does not prohibit "causing" an offense.

8. Government's Proposed Jury Instruction No. 68: We object to the inclusion of the word "caused" in the first element of the offense under 26 U.S.C. § 7206(2). The statute does not contain that word, and the instruction improperly expands the scope of the offense. *Compare* 18 U.S.C. § 2(b).

9. Government's Proposed Jury Instruction No. 69: We object to this instruction on several grounds. First, the instruction contains no affirmative definition of the term "aiding and assisting." It merely informs the jury of certain things that need not be shown to establish "aiding and assisting" or do not negate "aiding and assisting." Second, the instruction improperly marshals the evidence in a manner favorable to the prosecution. Third, the second paragraph of the instruction—which refers to the "knowledge or consent of an accountant or some other person filing the return"—misstates the law and improperly singles out one circumstance that the jury may consider in deciding the "aiding and assisting" issue.

10. Government's Proposed Jury Instruction No. 70: First, we object to the reference to "causing" in the definitions of a "false" tax return and of a "fraudulent" tax return. The word "causes" does not appear in 26 U.S.C. § 7206(2). *Compare* 18 U.S.C. § 2(b). Second, with respect to the issue of materiality, we incorporate the objections set forth in ¶ 5 above. Third, with respect to the issue of what the government must prove to establish under-reporting of income or overstatement of deductions, we incorporate the objections set forth in ¶ 6 above.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Cr. No. 94-373-A

UNITED STATES OF AMERICA

-vs-

WILLIAM ARAMONY and STEPHEN J. PAULACHAK and
THOMAS J. MERLO and
THE PARTNERSHIP UMBRELLA, INC.,
Defendants.

TRIAL TRANSCIPT

March 16, 1995

Before: Claude M. Hilton, Judge
And a Jury

* * * *

[1772] AT SIDE BAR

MR. MOFFITT: Your Honor, we need to make an objection for the record with respect to any communications between Mr. Aramony and Mr. Carter. As you know, you denied a motion that we filed stating that there was an attorney/client privilege relationship. The Fourth Circuit has ruled whatever they ruled, and I am not really sure—We should raise this during the course of trial, that's what the order says. I have got a copy of the order on this particular point. I want to make sure that we do not waive any objections with regard to the nature of the communication between Mr. Aramony, IGI, Lisle Carter and Verner Liipfert with respect to this particular area because that motion is pending.

MR. CLINE: May I elaborate, Your Honor? Just a little bit.

THE COURT: All right.

MR. CLINE: In connection with that, we would ask, as we did before trial, for an evidentiary hearing outside the presence of the jury on the attorney/client relationship issue.

If the Court denies the motion, we would ask for a continuing objection so we don't have to jump up every time one of these witnesses gets on the stand.

THE COURT: Well, I guess what I am not sure of, as [1773] far as the questions—The question here goes to what he did as General Counsel.

MR. MOFFITT: He said he did speak to somebody. And he is going to say that he spoke to Mr. Aramony at this particular point. That is clear. And I wanted before it came out to approach the bench and make the objection. It is clear that that's where this is headed.

THE COURT: And you are claiming an attorney/client privilege between the president and the General Counsel of the corporation?

MR. MOFFITT: Yes, sir.

MR. BELLOWS: Well, Your Honor, United Way has waived repeatedly its attorney/client privilege concerning Mr. Carter's testimony. Mr. Carter went down there as the United Way's General Counsel. He made disclosures, he made representations. And there is just no question that to the extent an attorney/client relationship existed, it was between United Way and Mr. Carter.

THE COURT: I believe that's correct. As far as whatever was being done in the course of business there at United Way, it is the privilege, the privilege is with United Way. And your objection is overruled, whatever it is.

MR. MOFFITT: Do we need to make a continuing objection every time there is a conversation, or can we preserve the record simply by making this objection and [1774] informing the Court that we have an objection

with respect to these conversations? I don't want to be popping up—

THE COURT: Well, the only problem that I have with the whole thing, I don't mind a continuing objection as it relates to his duties as General Counsel, but it seems to me that you have also had something in there concerning what Verner Liipfert may have done at a different time representing Mr. Aramony. I am not sure of what kind of capacity or relationship you are alleging.

MR. MOFFITT: I understand. I will make that objection for Verner Liipfert.

THE COURT: But as far as the General Counsel argument is concerned, you can have a continuing objection on that.

MR. CLINE: We just want to be sure the Court understands. We laid all this out in a pretrial motion.

THE COURT: That has been back some time ago.

MR. CLINE: A long time ago, sir. I don't want to repeat all that stuff, but the gist of it is that Mr. Aramony had a personal attorney/client relationship separate from United Way's attorney/client relationship with Mr. Carter.

THE COURT: That's what I was getting to about the continuing objection. I will give you a continuing objection to the General Counsel proposition, but raise—If you have got some personal attorney/client privilege to raise, you are [1775] going to have to raise that with the questions.

MR. CLINE: Okay.

THE COURT: Now, one of the problems, as I have said before, are these motions in limine. You know, you-all may understand what you are talking about better than I do when I look at it. If you look at these motions in limine, it is difficult to sort them all out in advance of hearing the evidence in the case.

Now, you are just going to have to object as you go along. And to go ahead and keep raising the whole thing right now is not going to help you because I am not going to rule on the whole thing.

MR. CLINE: We understand.

MR. MOFFITT: We just wanted to be clear.

MR. CLINE: So that the Court is clear, our contention is that a lot of the communications were both—

THE COURT: Well, this one certainly wasn't.

MR. CLINE: Your Honor, the contention is that both United Way and Mr. Aramony had a privilege. It is not that either one or the other had it, it is that they both had it.

THE COURT: In connection with the performance of his duties as General Counsel?

MR. MOFFITT: Yes. And I am going to tell you why.

THE COURT: Well, I have overruled that.

[1776] MR. MOFFITT: I understand you have, but I want you to understand the contention because after he spoke to United, to Mr. Aramony, he didn't go to United Way and disclose anything. He didn't do anything. He kept that within the breast of his own self. And so, I want you to, I want the Court to be clear that we are making a contention here.

THE COURT: All right. That wouldn't change the nature of the attorney/client—

MR. CLINE: One other thing. It will take five seconds. We made a motion for mistrial after Miss Florence's testimony yesterday. I am not rearguing that motion, I know what your ruling would be. I just wanted to tell you so you don't think we are trying to stick something behind your back. That we filed a newspaper article this morning because we think it highlights the prejudice that we suffered.

THE COURT: I saw that and I don't find it to be any different than the newspaper articles that have been going on for the previous four or five days. And your motion for a mistrial would be denied.

MR. CLINE: Would you like a copy of it?

THE COURT: I have one, yes.

MR. CLINE: Okay.

* * * *

[1855] NOTE: At this point a side-bar discussion is had between the Court and counsel out of the hearing of the jury as follows:

AT SIDE BAR

MR. MOFFITT: My learned colleague wants me—

MR. CLINE: I take full responsibility for this bench conference.

MR. MOFFITT: He wants me to renew our motion since Mr. Carter has now said that at times during his tenure at United Way he has represented both Mr. Aramony personally and the company.

MR. BELLOWS: Your Honor, I don't believe—

MR. CLINE: Just one second. I don't want to be a pest about this, but in his affidavit as I recall it, submitted in opposition to our motion, he said that during the period that he was General Counsel he never represented Mr. Aramony. Now on the witness stand he has testified that in fact he did.

We again renew the motion. We move to strike this witness' testimony. And we renew our attorney/client privilege notion with respect, motion, not notion, motion with respect to Mr. Carter's testimony. And we ask for an evidentiary hearing outside the presence of the jury where we can now explore what the true facts are.

THE COURT: Well, he—

[1856] MR. HEIDEMAN: We join in the motion.

THE COURT: The testimony that I have heard is that he represented him in two specific matters that do not relate to this case. And my ruling is the same. And my ruling in regard to an evidentiary hearing is the same, there is just no showing that would necessitate an evidentiary hearing of any kind.

MR. CLINE: Thank you, Your Honor.

NOTE: At this point the side-bar discussion is concluded; whereupon the case continues before the jury as follows:

BEFORE THE JURY:

MR. MOFFITT: I have no further questions, Your Honor.

* * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Cr. No. 94-373-A

UNITED STATES OF AMERICA

-vs-

WILLIAM ARAMONY and STEPHEN J. PAULACHAK and
THOMAS J. MERLO and
THE PARTNERSHIP UMBRELLA, INC.,
Defendants.

TRIAL TRANSCIPT

March 14, 1995

Before: Claude M. Hilton, Judge
And a Jury

* * * *

[1987] NOTE: At this point a side-bar discussion is had between the Court and counsel out of the hearing of the jury as follows:

AT SIDE BAR

MR. MOFFITT: Your Honor, for the record, we want to renew our objection to this testimony on the grounds of the attorney/client privilege. I know that we have made the argument, I am not here to argue it, I just want to make sure that the record is clear because we have contended all along that Mr. Nelson along with IGI was hired in part to represent Mr. Aramony.

And I know you know that from the prior motion, but I just want to make the record clear with respect to

that so that we can have a continuing objection with respect to this particular testimony as it relates to any statements made by Mr. Aramony to Mr. Nason or any representative of IGI.

MR. BELLOWS: Your Honor, we have no problem with him having a continuing objection. But while we are at the bench, if I could for a moment just address in the form of a motion in limine, I would like to make sure that—I'm not going to elicit from Mr. Nason the results of their investigation, the various reports that were issued, the [1988] various conclusions that they reached in April '92 that resulted in the report. And I want to make sure that I understand the Court's ruling and that defense counsel understand the Court's ruling that that is not something that we are going to get into. Because if in fact it is, I will get into it in direct. But all I am planning on asking him is about specific things he did in the course of his investigation, information that he acquired directly from Aramony, Paulachak and Merlo and his effort to acquire possession of certain documentation.

MR. MOFFITT: Your Honor, two things.

MR. HEIDEMAN: We object, Your Honor.

MR. MOFFITT: Two things. Mr. Nason has testified previously in a deposition that he draws no conclusion, he just gathers information, and I intend to elicit that from him. So that it was clear that he didn't write any reports that draw any conclusions. His testimony is pretty clear in that regard. I do intend to elicit that from him. I do intend to elicit from him what his purposes were, he is opening up the door for that, and why he was there. The first question is going to be, who do you work for? IGI. What was your purpose in doing that? And I intend to go into that with him.

MR. BELLOWS: Your Honor, I have no problem with any of that. My only concern is at a certain point in time [1989] IGI began generating reports. My concern is that we get bogged down into those reports, which are their conclusions. There is a lot of argument about what

they had, what they didn't have, when they generated their reports, and I just wanted to address that issue. I believe—

THE COURT: Well, I have ruled—Let me deal with this first.

MR. HEIDEMAN: Yes.

THE COURT: I have ruled that their reports and their conclusions are not admissible. What is admissible is statements, facts or whatever. And I don't know where that leads us.

MR. MOFFITT: Well, Your Honor, I don't intend to put—

THE COURT: It seems to me that is clear enough.

MR. MOFFITT: But I do intend to elicit what they did. And I intend to elicit until probably April 2 what they did.

MR. BELLOWS: Well, it includes reports that they issued. They issued five or six reports in February. And I am not planning on getting into those reports in February because I thought that is exactly—

MR. MOFFITT: I am not going to get into the reports.

THE COURT: I don't think there is any dispute [1990] about that. What objection do you want to raise?

MR. HEIDEMAN: On behalf of Mr. Merlo, I remind the Court we filed an advance motion in limine. We don't believe that this testimony is competent at all. These people weren't on the scene at the time that anything occurred. The role that they played was as a private investigative firm being brought in after the fact to look around and do some things. And we don't believe that they are competent to testify to anything. And we don't believe that they should be allowed to put into evidence through this witness any alleged statements of any of the, of any of the defendants. We've briefed that. We argued it. And we ask the Court to completely keep it out. If they have a direct witness with knowledge, they ought to bring them in here.

MR. BONNER: Let me join in that.

THE COURT: I am not going to keep it completely out. I have already ruled on the areas that they can bring in. And you are going to have to object when you feel that something is improper because you have no, nothing on the record at the moment. I have denied your motion in limine, but you can object at any time that you feel something that is offered that is improper.

MR. CLINE: Just to follow up on what Mr. Moffitt said. Do we have the continuing objection on the attorney/client issue? I don't think the Government has any [1991] problem with that.

MR. BELLOWS: For this witness.

MR. CLINE: For this witness. On his communications with Mr. Aramony.

THE COURT: Yes.

MR. CLINE: Okay, thank you.

NOTE: At this point the side-bar discussion is concluded; whereupon the case continues before the jury as follows:

BEFORE THE JURY

MR. BELLOWS: Mr. Nason.

NOTE: The witness is sworn.

JEFFREY A. NASON, a witness called by counsel for the United States, first being duly sworn, testifies and states:

DIRECT EXAMINATION

BY MR. BELLOWS:

Q Would you state your full name, please.

A Jeffrey Alan Nason.

Q Mr. Nason, how are you currently employed?

A I am a senior investigator with Investigative Group Inc., and director of Philadelphia operations.

* * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Cr. No. 94-373-A

UNITED STATES OF AMERICA

-vs-

WILLIAM ARAMONY and STEPHEN J. PAULACHAK and
THOMAS J. MERLO and
THE PARTNERSHIP UMBRELLA, INC.,
Defendants.

TRIAL TRANSCRIPT

March 22, 1995

Before: Claude M. Hilton, Judge
And a Jury

* * * *

[2593] MR. NUDELMAN: Thank you. And lastly, we just reserve the right to submit in the morning a theory of defense on behalf of Mr. Merlo, an instruction.

THE COURT: A theory of defense instruction? You can tell them that in opening statement. I am not going to allow the prosecutor to submit a theory of the prosecution.

MR. GUIDOBONI: Does that mean you are keeping the indictment out, Your Honor?

THE COURT: No. I said a theory of the case.

MR. NUDELMAN: That's it. Thank you.

* * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Cr. No. 94-373-A

UNITED STATES OF AMERICA

-vs-

WILLIAM ARAMONY and STEPHEN J. PAULACHAK and
THOMAS J. MERLO and
THE PARTNERSHIP UMBRELLA, INC.,
Defendants.

TRIAL TRANSCIPT

March 23, 24, 27-31 and April 3, 1995

Before: Claude M. Hilton, Judge
And a Jury

* * * *

[2781] In order to sustain its burden of proof on count one the Government must prove beyond a reasonable doubt that one of the members to the agreement knowingly performed at least one overt act and that this overt act was actually performed during the existence or life of the conspiracy and was done to somehow further the goals of the conspiracy or agreement.

The term overt act means some type of outward objective action performed by one of the parties to or one of the members of the agreement or conspiracy which evidences that agreement.

Although you must unanimously agree that the same overt act was committed, the Government is not required

to prove more than one overt act, more than one of the overt acts charged.

The over act may but for the alleged illegal agreement appear totally innocent and legal. And the Government is not required to prove that the parties to or members of the conspiracy were successful in achieving any and all of the objects of the conspiracy.

Now, a member of a conspiracy who commits another [2782] crime during the existence or life of a conspiracy and commits this other crime in order to further or somehow advance the goals or objectives of the conspiracy, may be found by you to be acting as the agent of the other members of the conspiracy. The illegal actions of this person in committing this other crime may be attributed to other individuals who are then members of the conspiracy.

Under certain conditions, therefore, a defendant may be found guilty of this other crime even though he or she did not participate directly in the acts constituting the offense.

If you find that the Government has proven a defendant guilty of conspiracy as charged in count one of the indictment, you may also find him guilty of the crimes alleged in any other counts of the indictment in which he is charged provided you find that the essential elements of these counts as defined in these instructions have been established beyond a reasonable doubt.

And further, that you also find beyond a reasonable doubt that, one, the substantive offense of mail fraud, wire fraud, interstate transportation of money taken by fraud, and tax fraud were committed by a member of the conspiracy.

Two, the substantive crime was committed during the existence or life of and in furtherance of the goals of the conspiracy.

[2783] And third, that at the time this offense was committed the defendant was a member of the conspiracy.

Now, counts two through nine, as I indicated to you, charge the offenses of mail fraud and wire fraud. Now,

Section 1341 of Title 18, United States Code, provides in part that whoever having devised or intending to devise any scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations or promises and for the purpose of executing such scheme or artifice or attempting to do so places in any Post Office or authorized depository for mail matter any matter or thing whatever to be sent or delivered by the Postal Service or takes or receives therefrom or knowingly causes to be delivered by mail according to the directions thereon, shall be guilty of an offense against the United States.

There are three essential elements of this offense which the Government must prove beyond a reasonable doubt. The first is that the defendant knowingly devised or participated in a scheme or artifice to defraud or to obtain money or property by means of false or fraudulent pretenses, representations or promises.

Second, that the defendant acted with the intent to defraud.

* * * *

[2791] In order to prove this offense, there are three essential elements that the Government must prove beyond a reasonable doubt. The first is that the defendant made or caused to be made and signed the tax return which contained a written declaration that it was made under penalty or perjury that was filed with the Internal Revenue Service.

Second, that the return was false as to one or more material matters charged in the indictment.

And three, that the defendant acted willfully in making and signing the false return.

Concerning the first element, the fact that one's name is signed to a document is prima facie evidence for all purposes that the return or other document was actually signed by him.

Further, whenever the fact appears from evidence in the case that the defendant signed an income tax return

or other document, you may infer that he had knowledge of the contents of that return or document.

I would further instruct you that the IRS form 1040, U.S. corporation tax return form 1120, and tax exempt origination return, it should be organization, I believe, form 990 are such returns as contemplated by Section 7206 and contain a declaration that such return is prepared under penalties of perjury.

Concerning the second element, I would instruct you [2792] that a false deduction on a tax return is a material item. Similary, income admitted from a tax return is a material matter.

Now, counts 25 through 46 charge that the tax returns were false in several material respects. Where several items on the tax return are charged to be false, it is not necessary that the Government prove each and every element charged is false or fraudulent. It is only necessary that the Government prove one item is false or fraudulent. While the Government need only prove one false item, you must be unanimous as to that item.

It is also not necessary for the Government to prove that income was underreported or that the deductions were overstated in the exact amount alleged. It is necessary only that the Government prove beyond a reasonable doubt that the income was understated or that the deductions were overstated by some substantial amount.

A return or an entry on a return is false if it was untrue when made and was then known to be untrue by the person making it.

A return is fraudulent if it was falsely made or caused to be made with the intent to deceive.

* * * *

[2811] THE COURT: Well, they didn't timely ask for it, but they did ask for it.

MR. CLINE: We did timely ask for it, Your Honor, it is one of our proposed instructions.

THE COURT: All right. I will tell them that. What else?

MR. CLINE: On *Pinkerton*, the first objection is that count ten should be excluded from the scope of the *Pinkerton* instruction.

Second, as part of the *Pinkerton* instruction the jury should be informed that the substantive offense must be reasonably foreseeable as a necessary or natural consequence of the conspiratorial agreement. The Court omitted the requirement of reasonable foreseeability from its definition of *Pinkerton* liability.

Third, the jury has been instructed I think on counts—Well, on the mail fraud and ITSP counts, on three theories of liability on it. They have been instructed on liability as a principal, they have been instructed on aiding and abetting, now they have been instructed on *Pinkerton*. I think the Court should instruct the jury that it must be unanimous as to the basis for liability since it has all these options available to it.

I don't think it would be—I think it would [2812] violate our right to a jury trial to have four jurors come up with one theory, four jurors come up with another, four others come up with a third theory and end up convicting any of the defendants.

We have such an instruction proposed, it is our number 53. And we would ask that you give it.

MR. BELLOWS: Your Honor, we oppose that. I don't believe that is a correct statement of the law, although I am not sure why, but Mr. Barger told me it wasn't.

MR. BARGER: My understanding is as long as they are sufficiently instructed on the elements of the offense and on the elements of the liability, they don't need to be further instructed.

THE COURT: I believe that they have been sufficiently instructed. What else do you have?

MR. CLINE: Next, the Court gave an instruction on aiding and abetting which I don't have any objection to. It followed that instruction with a multiple defendant aiding and abetting type instruction. I think it was Gov-

ernment's Exhibit instruction number 21, which omitted the requirement of willfulness. And I think it is confusing for that reason.

* * * *

[2817] THE COURT: I believe the jury is properly instructed in that regard.

MR. CLINE: With respect to Section 7206(1) and I think also 7206(2), the Court instructed the jury that 1040s, 1120s and 990s are returns. I think we have a right to a jury determination on that. It may not be a close question in this case, but I think we have a right to have the jury decide it.

Similarly, on the issue of whether deductions or omissions of income are material. Essentially the question of materiality on those two types of offenses, 7206(1) and 7206(2). I believe we have a right to a jury determination on that issue as well. And as I recall, the Court instructed the jury that those things were material and took the issue from the jury.

THE COURT: I find the jury is properly instructed in that regard as well.

* * * *

Supreme Court, U.S.
FILED
FEB 14 1997
CLERK

(2)

No. 96-752

In the Supreme Court of the United States

OCTOBER TERM, 1996

WILLIAM ARAMONY AND THOMAS J. MERLO,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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24 pp

QUESTIONS PRESENTED

1. Whether the district court correctly instructed the jury on co-conspirator liability under the *Pinkerton* doctrine.

2. Whether it was reversible error for the district court to withhold from the jury the materiality element on the tax fraud counts.

3. Whether the district court acted within its discretion in denying petitioners' claim for an evidentiary hearing on certain privilege issues.

4. Whether the district court properly declined to give a "theory of defense" instruction for petitioner Merlo.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-752

WILLIAM ARAMONY AND THOMAS J. MERLO,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-46a) is reported at 88 F.3d 1369.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 1996. A petition for rehearing was denied on August 13, 1996. Pet. App. 47a-48a. The petition for a writ of certiorari was filed on November 12, 1996 (a Tuesday following a holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioners were convicted of conspiracy to defraud the United States, in violation of 18 U.S.C. 371; mail fraud, in violation of 18 U.S.C. 1341; wire fraud, in violation of 18 U.S.C. 1343; interstate transportation of fraudulently acquired property, in violation of 18 U.S.C. 2314; engaging in monetary transactions in the proceeds of unlawful activity, in violation of 18 U.S.C. 1957; and filing false tax returns, in violation of 26 U.S.C. 7206(1) and (2). Petitioner Aramony was sentenced to 84 months' imprisonment, to be followed by a three-year term of supervised release. Petitioner Merlo was sentenced to 55 months' imprisonment, to be followed by a three-year term of supervised release. In addition, petitioners were ordered to forfeit $552,188.97. The court of appeals reversed petitioners' convictions under Section 1957, on which the forfeiture order was based, but affirmed their convictions on all other counts. The court vacated the forfeiture order and remanded for resentencing. Pet. App. 1a-46a.

1. Petitioners' convictions arose from their participation in a scheme to defraud the United Way of America (UWA), a non-profit organization that acts as a service organization for local United Way chapters throughout the United States. Petitioner Aramony was chief executive officer of UWA from 1970 until 1992, when he was fired. Petitioner Merlo, a certified public accountant and a close friend of Aramony, performed accounting services for UWA in the 1970s and became UWA's chief financial officer in late 1989. Co-defendant Stephen Paulachak worked

for UWA from the 1970s until 1988, when he left to become the president of Partnership Umbrella, Inc. (PUI). PUI was a for-profit organization established by the UWA Board of Directors in 1986 to ensure, among other things, UWA's continued status as a non-profit organization. Pet. App. 3a-4a.

From the mid-1980s until the early 1990s, petitioners used UWA's money for their own personal gain; Aramony, in particular, used that money to underwrite his relationships with various women. During the late 1980s, for example, Aramony regularly flew to Florida at UWA expense to visit Lori Villasor, and he used UWA and PUI funds to pay Villasor's way on trips she took with him. Aramony used Merlo to funnel additional money to Villasor. For instance, from 1988 to 1991, Merlo received more than $300,000 in consulting fees from PUI despite doing no work for the money; he then, in turn, gave Villasor $89,000 that she did not earn. Pet. App. 4a-6a. Similarly, with Merlo's help, Aramony diverted corporate donations from UWA to a Florida corporation that he controlled, and then used that money to buy himself a Florida condominium, which was furnished with UWA funds. *Id.* at 6a-7a. For his part, Merlo used his position as UWA's chief financial officer to enrich himself by, for example, improperly converting a $375,000 UWA annuity to his personal property. *Id.* at 7a-8a.

Aramony aided in the filing of false tax returns on behalf of UWA for tax years 1989 and 1990. He also filed false personal income tax returns for tax years 1988 through 1990, claiming false deductions and understating his income. Merlo aided in the filing of false tax returns for PUI in tax years 1989 and 1990, aided in the filing of two false tax documents for work

that Villasor never did, and filed three other false tax returns. Pet. App. 8a.

2. In late 1991, Aramony learned that the *Washington Post* was investigating alleged improprieties in the management of UWA. Soon thereafter, UWA, through General Counsel Lisle Carter, hired Investigative Group, Inc. (IGI) to conduct an internal investigation. In January 1992, IGI delivered its preliminary findings to the UWA Board of Governors. In early February 1992, UWA retained the Washington law firm of Verner, Liipfert, Bernhard, McPherson & Hand to join the investigation and give legal advice concerning UWA's response to any negative publicity that might arise from the *Washington Post* investigation. Pet. App. 35a-36a.

During UWA's internal investigation, Aramony made communications to Carter and IGI investigators that were later used against him in his criminal prosecution. Pursuant to subpoena, the Verner, Liipfert attorneys produced various documents to the government that tended to incriminate Aramony. Long after those documents were produced (with Aramony's knowledge and acquiescence, see Pet. App. 44a), Aramony claimed that Carter, IGI, and the Verner, Liipfert attorneys had all breached duties of confidentiality to him. He moved to suppress the documents and his communications to Carter and IGI on grounds of attorney-client privilege. He also moved for an evidentiary hearing on his privilege claims. See *id.* at 38a-39a & n.12.

The district court denied Aramony's suppression motion. The court based that ruling on overwhelming evidence that the attorneys in question represented UWA and not Aramony, and that Aramony therefore had no attorney-client relationship that could support

his claims of privilege. See Pet. App. 35a-45a. Moreover, the district court found "from the submissions and the affidavits presented that there isn't a sufficient issue presented that would necessitate any kind of evidentiary hearing. The affidavits presented by all of the lawyers in the case have stated that there was no attorney/client relationship." C.A. App. 335; Pet. App. 38a.

Aramony then sought a writ of mandamus requiring the district court to conduct an evidentiary hearing on the privilege issue. The court of appeals dismissed that request "without prejudice to [Aramony's] right to raise the attorney-client privilege during the course of the trial." Pet. App. 38a; C.A. App. 525. At trial, Aramony cross-examined Carter and an IGI investigator on the privilege issue, but he did not seek the testimony of the Verner, Liipfert attorneys. Pet. App. 43a n.13.

3. At the close of trial, the district court instructed the jury that petitioners could be held accountable for the substantive offenses of any coconspirator so long as, among other things, "the substantive crime was committed during the existence or life of and in furtherance of the goals of the conspiracy." See Pet. App. 17a-19a (quoting full instruction); see generally *Pinkerton* v. *United States*, 328 U.S. 640 (1946). Aramony objected to that instruction on the ground that it did not explicitly predicate *Pinkerton* liability on a finding that the substantive offenses in question were "reasonably foreseeable as a necessary or natural consequence of the conspiratorial agreement." Pet. App. 17a.

In instructing the jury on the elements of filing a false tax return under 26 U.S.C. 7206, the district court—over defense objection, but in accordance with

the controlling precedent at the time of trial—did not submit to the jury the issue of the materiality of the false statements in the tax returns. Pet. App. 23a-24a. Instead, the court told the jury: "Concerning the [materiality] element, I would instruct you that a false deduction on a tax return is a material item. Similarly, income [omitted] from a tax return is a material matter." *Id.* at 24a; C.A. App. 1587-1588. After trial, this Court decided *United States* v. *Gaudin*, 115 S. Ct. 2310 (1995), holding that the Constitution entitles a defendant to jury consideration of the materiality element in a false-statements prosecution under 18 U.S.C. 1001. Petitioners moved for a new trial on their Section 7206 convictions on the ground that the materiality issue should have been submitted to the jury. The district court denied those motions. Pet. App. 24a-25a.

4. The court of appeals reversed petitioners' convictions under 18 U.S.C. 1957, which prohibits monetary transactions in the proceeds of unlawful activity, but affirmed their convictions on all other counts. Pet. App. 1a-46a. (Because the forfeiture order was predicated on the reversed convictions, the court vacated that order and remanded for resentencing. *Id.* at 35a n.11, 46a.)

The court first rejected petitioners' contention that the district court's instruction inadequately conveyed the requirements of the *Pinkerton* doctrine. Following circuit precedent, see *United States* v. *Chorman*, 910 F.2d 102 (4th Cir. 1990), the court held that, even though the instruction did not use the "reasonably foreseeable" language requested by petitioners, it accurately represented *Pinkerton*'s theory of liability. Pet. App. 19a-22a.

The court also rejected petitioners' challenge to the district court's instructions concerning the elements of filing a false tax return. The court found that, even if *Gaudin* required jury consideration of the materiality issue (an issue the court did not reach), the district court's failure to submit that issue to the jury was harmless beyond a reasonable doubt because the jury's other findings were functionally equivalent to a finding of materiality. Pet. App. 26a-30a. Specifically, the district court had instructed the jury that, to convict, it needed to find "that the income was understated or that the deductions were overstated by some substantial amount." C.A. App. 1588; Pet. App. 26a. The court of appeals explained that, because the materiality inquiry asks "whether a particular item must be reported 'in order that the taxpayer estimate and compute his tax correctly,'" Pet. App. 28a (quoting *United States* v. *Null*, 415 F.2d 1178, 1181 (4th Cir. 1969)), a "finding of substantiality necessarily included a finding of materiality," and any error the district court made in failing to instruct on the latter issue was therefore harmless. *Id.* at 30a.

The court also rejected petitioners' claim that the district court improperly admitted privileged communications. Pet. App. 35a-45a. The court upheld the district court's findings that Aramony had no confidential relationship with Carter, the IGI investigators, or the Verner, Liipfert lawyers. *Id.* at 41a, 44a. The court further held that, "[b]ecause the affidavits submitted by the government and the testimony of the government's witnesses, when taken at face value, reveal there was no chance Aramony would prevail on his claim, the district court did not err when it refused to hold an evidentiary hearing." *Id.* at 40a n.12; see also *id.* at 44a-45a.

As to petitioners' other claims, the court found "no error committed by the district court affecting [their] substantial rights." Pet. App. 46a.

ARGUMENT

1. Petitioners contend (Pet. 7-10) that the district court's *Pinkerton* instruction requires reversal because it did not explicitly state that a defendant is liable under the *Pinkerton* doctrine for the substantive acts of his co-conspirators only if those acts were "reasonably foreseeable." That claim is without merit.

In *Pinkerton* v. *United States*, 328 U.S. 640 (1946), defendant Daniel Pinkerton and his brother were charged with conspiracy to violate the tax laws and with two substantive tax violations. Although no evidence was introduced showing that Daniel Pinkerton participated directly in the commission of the substantive offenses, the district court instructed the jury that each defendant could be found guilty of the other's substantive offenses if they were both part of the same criminal conspiracy and "the acts referred to in the substantive counts were acts in furtherance of the unlawful conspiracy or object of the unlawful conspiracy." *Id.* at 645 n.6; see also *id.* at 645. This Court upheld Daniel Pinkerton's conviction under a theory of co-conspirator liability, but cautioned that the case would be different "if the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement." *Id.* at 647-648.

As petitioners correctly note (see Pet. 8-9), the courts of appeals commonly cite that passage of *Pinkerton* in describing the scope of co-conspirator liability.[1] Some circuits, like the Fourth Circuit in this case, have found that an instruction may adequately convey *Pinkerton*'s theory of co-conspirator liability without specifically referring to a "reasonable foreseeability" requirement. See *United States* v. *Chorman*, 910 F.2d 102, 111 (4th Cir. 1990); *United States* v. *Manzella*, 791 F.2d 1263, 1267-1268 (7th Cir. 1986); *United States* v. *Vasquez*, 858 F.2d 1387, 1393 & n.3 (9th Cir. 1988), cert. denied, 488 U.S. 1034 & 489 U.S. 1029 (1989); cf. *United States* v. *Pinkney*, 15 F.3d 825, 828 (9th Cir. 1994) (indicating that sentence enhancement under *Pinkerton* is proper only where co-conspirator's substantive acts are reasonably foreseeable). In contrast, other circuits have indicated that a *Pinkerton* instruction must explicitly include "reasonable foreseeability" language even though that language did not, in fact, appear in the jury

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[1] See, *e.g.*, *United States* v. *Mothersill*, 87 F.3d 1214, 1218 (11th Cir.), cert. denied, 117 S. Ct. 531 (1996), petition for cert. pending, No. 96-6899 (filed Nov. 22, 1996); *United States* v. *Pimentel*, 83 F.3d 55, 58 (2d Cir. 1996); *United States* v. *Friend*, 50 F.3d 548, 552-553 (8th Cir. 1995), cert. denied, 116 S. Ct. 814, reh'g granted, order denying certiorari vacated, and judgment vacated on other grounds, 116 S. Ct. 1538 (1996); *United States* v. *Christian*, 942 F.2d 363, 367 (6th Cir. 1991), cert. denied, 502 U.S. 1045 (1992); *United States* v. *Cummings*, 937 F.2d 941, 944 (4th Cir.), cert. denied, 502 U.S. 948 (1991); *United States* v. *Garcia*, 909 F.2d 1346, 1350 n.1 (9th Cir. 1990); *United States* v. *Romero*, 897 F.2d 47, 51 (2d Cir.), cert. denied, 497 U.S. 1010 (1990), 498 U.S. 1092 (1991); *United States* v. *Diaz*, 864 F.2d 544, 549 (7th Cir. 1988), cert. denied, 490 U.S. 1070 (1989); *United States* v. *Meester*, 762 F.2d 867, 877 (11th Cir.), cert. denied, 474 U.S. 1024 (1985).

instructions in *Pinkerton* itself. See *United States* v. *Turcks*, 41 F.3d 893, 897 (3d Cir. 1994), cert. denied, 115 S. Ct. 1716 (1995); *United States* v. *Broadwell*, 870 F.2d 594, 603 (11th Cir.), cert. denied, 493 U.S. 840 (1989); cf. *United States* v. *Friend*, 50 F.3d 548, 553 n.3 (8th Cir. 1995) (approving instructions that include the "reasonable foreseeability" language, but not directly addressing issue), cert. denied, 116 S. Ct. 814, reh'g granted, order denying certiorari vacated, and judgment vacated on other grounds, 116 S. Ct. 1538 (1996); *United States* v. *Lucas*, 932 F.2d 1210, 1220 (8th Cir.) (same), cert. denied, 502 U.S. 869, 929, 949, 991 (1991), 502 U.S. 1100 (1992). We are aware of no case, however, and petitioners cite none, in which a court of appeals has reversed a conviction because the *Pinkerton* instruction omitted such language.

The better practice is to include "reasonable foreseeability" language in any *Pinkerton* instruction. Nonetheless, because the district court's instruction adequately conveyed *Pinkerton*'s theory of co-conspiratorial liability, it did not constitute reversible error. Although it omitted the "reasonable foreseeability" language, it did instruct the jury that a finding of co-conspirator liability is appropriate only if "the substantive crime was committed during the existence or life of and in furtherance of the goals of the conspiracy." Pet. App. 18a. In that respect, the instruction here was substantively indistinguishable from the one given in *Pinkerton*. See 328 U.S. at 645 n.6.

In any event, any error in the district court's *Pinkerton* instruction was harmless. In light of the evidence introduced at trial, see Gov't C.A. Br. 5-41, it appears likely that petitioners' convictions on the substantive counts rested not on a *Pinkerton* theory,

but on their direct involvement in the substantive offenses at issue, either as principals or as aiders and abettors. See *id.* at 58. Thus, because the *Pinkerton* instruction was superfluous, any error in that instruction was harmless. See, *e.g.*, *Broadwell*, 870 F.2d at 609 ("[W]e find no prejudicial error in the district court's failure to provide the 'reasonably foreseeable' portion of the instruction."); *United States* v. *Meester*, 762 F.2d 867, 878 n.9 (11th Cir.) (no prejudicial error in failing to include "foreseeability" language in the *Pinkerton* charge), cert. denied, 474 U.S. 1024 (1985); *United States* v. *Roselli*, 432 F.2d 879, 894 n.25 (9th Cir. 1970) (omission of "reasonable foreseeability" instruction not reversible error), cert. denied, 401 U.S. 924 (1971); see also *Turcks*, 41 F.3d at 897-899 (upholding conviction on plain-error review under Fed. R. Crim. P. 52(b) because defendant was not prejudiced by erroneous *Pinkerton* charge). For that reason, this would be an inappropriate case for resolving any disagreement among the circuits concerning whether a *Pinkerton* instruction is incomplete if it omits "reasonable foreseeability" language.

2. Petitioners also contend (Pet. 10-14) that their convictions should be reversed because the district court failed to submit the materiality element to the jury with respect to the tax-fraud counts under 26 U.S.C. 7206.[2] That claim warrants no further review.

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[2] An individual violates Section 7206(1) if he "[w]illfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter." Similarly, an individual violates Section 7206(2) if he "[w]illfully aids or assists in * * * the preparation or

The materiality inquiry under Section 7206 asks "whether a particular item must be reported 'in order that the taxpayer estimate and compute his tax correctly.'" *United States* v. *Null*, 415 F.2d 1178, 1181 (4th Cir. 1969) (citation omitted); see also *United States* v. *Warden*, 545 F.2d 32, 37 (7th Cir. 1976). The materiality of false statements concerning a taxpayer's income or deductions therefore does not turn on the amount of unpaid tax. See *United States* v. *Klausner*, 80 F.3d 55, 60-61 (2d Cir. 1996); *United States* v. *Holland*, 880 F.2d 1091, 1096 (9th Cir. 1989); *United States* v. *Young*, 804 F.2d 116, 119 (8th Cir. 1986), cert. denied, 482 U.S. 913 (1987); *United States* v. *Citron*, 783 F.2d 307, 313 (2d Cir. 1986); *United States* v. *Gaines*, 690 F.2d 849, 858 & n.16 (11th Cir. 1982); *United States* v. *Hedman*, 630 F.2d 1184, 1196 (7th Cir. 1980), cert. denied, 450 U.S. 965 (1981); see also *United States* v. *Helmsley*, 941 F.2d 71, 92 (2d Cir. 1991), cert. denied, 502 U.S. 1091 (1992). To the contrary, any false statement on a tax return that underreports income or overstates deductions is necessarily material as a matter of law. See *Klausner*, 80 F.3d at 61.

Even if we assume that the district court's failure to submit the materiality issue to the jury was error under *United States* v. *Gaudin*, 115 S. Ct. 2310 (1995), an issue that the court of appeals did not address, Pet. App. 26a, the court of appeals correctly found it to be harmless. This Court has held that many errors in jury instructions involving a single element of an offense are simple trial errors, subject to harmless-

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presentation under, or in connection with any matter arising under, the internal revenue laws, of a return * * * which is fraudulent or is false as to any material matter."

error analysis. See *Yates* v. *Evatt*, 500 U.S. 391, 404 (1991) (erroneous rebuttable presumption); *Rose* v. *Clark*, 478 U.S. 570, 580 (1986) (same); *Carella* v. *California*, 491 U.S. 263 (1989) (per curiam) (erroneous conclusive presumption); *Pope* v. *Illinois*, 481 U.S. 497, 503 (1987) (unconstitutional misdescription of element of offense). For example, an instructional omission is harmless if, on a different count or element, the jury actually reached a determination that is "functionally equivalent" to the determination that was erroneously withheld from the jury. See *Sullivan* v. *Louisiana*, 508 U.S. 275, 281 (1993); *Carella*, 491 U.S. at 271 (Scalia, J., concurring in the judgment); see also *California* v. *Roy*, 117 S. Ct. 337, 339 (1996) (per curiam).

Here, as the court of appeals determined (Pet. App. 28a-30a), the district court's failure to submit the materiality issue to the jury was harmless because the jury in fact made the functional equivalent of a materiality finding. The district court instructed the jury that, to convict, it needed to find "beyond a reasonable doubt that the income was understated or that the deductions were overstated by some substantial amount." C.A. App. 1588; see Pet. App. 26a. In convicting petitioners, the jury made that finding, and, *a fortiori*, it necessarily found that petitioners' false statements met the less demanding test for materiality: "whether a particular item must be reported in order that the taxpayer estimate and compute his tax correctly." See Pet. App. 28a (internal quotation marks omitted); see also *Helmsley*, 941 F.2d at 92 ("False statements about income do not have to involve substantial amounts in order to violate [26 U.S.C. 7206(1)].").

Petitioners cite no case, and we are aware of none, in which a court of appeals has reversed a conviction for *Gaudin* error even where, as here, the jury actually made the functional equivalent of a materiality finding. Compare *United States* v. *DiRico*, 78 F.3d 732, 736-738 (1st Cir. 1996) (declining to conduct harmless-error review of *Gaudin* error, but not addressing whether such error might be harmless in cases where "functional equivalence" analysis would be available), with *United States* v. *Lopez*, 71 F.3d 954, 960-961 (1st Cir. 1995) (suggesting that *Gaudin* error is subject to harmless-error review under "functional equivalence" analysis, but declining to decide issue because facts of case foreclosed that analysis), cert. denied, 116 S. Ct. 2529, cert. dismissed, 117 S. Ct. 38 (1996); see also *United States* v. *DeCastro*, No. 95-4648, 1997 WL 20471, at *5-*6 (11th Cir. Feb. 5, 1997) (*Gaudin* error "is not reversible per se, but is subject to harmless error review"); *United States* v. *Keys*, 95 F.3d 874, 881 (9th Cir. 1996) (en banc) (reversing conviction for *Gaudin* error because, in deciding other elements of offense, "the jury would not necessarily have had to find that the false testimony in question was material"), petition for cert. pending, No. 96-1089 (filed Jan. 9, 1997); *United States* v. *Raether*, 82 F.3d 192, 194 (8th Cir. 1996) (reversing conviction for *Gaudin* error because "[t]he jury did not make any findings that are so closely related to the materiality issue that they are functionally equivalent to a materiality finding"); *United States* v. *Pettigrew*, 77 F.3d 1500, 1511 (5th Cir. 1996) (declining to conduct harmless-error review of *Gaudin* error, but not addressing applicability of "functional equivalence"

analysis).[3] In short, the court of appeals' decision was both correct and consistent with existing case law.[4]

3. Petitioners also argue (Pet. 14-15) that the district court erred in denying their motion to suppress

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[3] Relying on *Roy* v. *Gomez*, 81 F.3d 863, 866-867 (9th Cir. 1996) (en banc), later vacated by this Court in *California* v. *Roy*, 117 S. Ct. 337 (1996) (per curiam), the *Keys* court suggested that a "functional equivalence" analysis would be appropriate only where a trial court "simply fails to alert the jurors they must consider" an element of an offense, and not (as in this case) where "a court instructs the jury that an element of the crime has been established as a matter of law." 95 F.3d at 880; see also *United States* v. *Rogers*, 94 F.3d 1519, 1526 n.13 (11th Cir. 1996) (suggesting same and discussing pre-*Sullivan* Eleventh Circuit case law barring harmless-error review of erroneous directed verdicts). Those suggestions in the Ninth and Eleventh Circuits' opinions were dicta, and, to our knowledge, no court of appeals has directly held that harmless-error analysis is necessarily inappropriate in cases in which a district court instructs the jury that materiality is established as a matter of law.

[4] This Court recently granted certiorari to resolve a circuit conflict on the proper standard for appellate review of a district court's erroneous failure, in the absence of a timely objection, to submit to the jury the element of materiality in a perjury prosecution. See *Johnson* v. *United States*, cert. granted, 117 S. Ct. 451 (No. 96-203) (to be argued Feb. 25, 1997). This petition need not be held pending this Court's decision in *Johnson*. The petitioner in *Johnson*, like petitioners here, does argue that instructing the jury that the materiality element is satisfied constitutes "structural error" that can never be harmless. Unlike this case, however, *Johnson* is a plain-error case in which there is no claim that the jury actually made a functionally equivalent finding on the omitted element. This Court's resolution of *Johnson* is therefore unlikely to shed light on the issue presented here. (We have provided petitioners here with a copy of our brief in *Johnson*.)

attorney-client communications without conducting an evidentiary hearing. That claim is factbound and without merit.

An evidentiary hearing need be held on a defendant's pretrial motions only when the defendant demonstrates a colorable claim for relief. See generally *United States* v. *Voigt*, 89 F.3d 1050, 1067 (3d Cir.), cert. denied, 117 S. Ct. 623 (1996); *United States* v. *Harrelson*, 705 F.2d 733, 737 (5th Cir. 1983). Whether the defendant has made that threshold showing is left to the broad discretion of the district court. *United States* v. *Smith-Bowman*, 76 F.3d 634, 637 (5th Cir.), cert. denied, 116 S. Ct. 2537 (1996); *United States* v. *Richardson*, 764 F.2d 1514, 1527 (11th Cir.), cert. denied, 474 U.S. 952 (1985); *Harrelson*, 705 F.2d at 737; *United States* v. *Losing*, 539 F.2d 1174, 1178 (8th Cir. 1976).

Here, it was well within the district court's discretion to deny an evidentiary hearing on the issue of attorney-client privilege. The affidavits filed by all the lawyers in question refuted Aramony's claim that he was their client or that his communications to them were privileged. Moreover, the numerous documents submitted by the government—retention letters, UWA internal documents, checks for services rendered, and letters from Aramony's personal attorneys to UWA's counsel—all established that the lawyers in question represented only UWA and not Aramony. Finally, when UWA's counsel informed Aramony's personal attorney that he planned to produce documents about Aramony to the federal grand jury, neither Aramony nor his personal lawyer sought to prevent that disclosure on grounds of privilege. In those circumstances, and in light of Aramony's own failure to present credible evidence of

his own to support his privilege claims, the district court correctly denied Aramony's request for a pretrial evidentiary hearing. See Pet. App. 35a-45a. And, as the court of appeals held, because Merlo presented no evidence at all in support of his claim of privilege, no hearing to reject that claim was required. *Id.* at 45a n.14.

Petitioners assert (Pet. 14-15) that the court of appeals' disposition of the privilege issue conflicts with another Fourth Circuit decision and with the decisions of other circuits. That is incorrect. In the decisions at issue, the defendants had made more colorable claims of privilege than petitioners made here, and they therefore had a more plausible factual basis for seeking appellate relief based on the denial of an evidentiary hearing.

4. Finally, petitioner Merlo contends (Pet. 16) that the district court erred in refusing to give a "theory of defense" instruction. That claim is without substance. During the charge conference, Merlo's counsel told the court: "we just reserve the right to submit in the morning a theory of defense on behalf of Mr. Merlo, an instruction." Pet. App. 69a. The district court responded that it would not instruct the jury on the theories developed by either the prosecution or the defense, but that defense counsel was itself free to present Merlo's theory of the case in closing argument. *Ibid.* Defense counsel did not object to that ruling or actually submit a proposed "theory of defense" instruction. Indeed, petitioner still does not describe the instruction to which he claims he was entitled. Accordingly, there is no identifiable issue for this Court to review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

WILLIAM ARAMONY and THOMAS J. MERLO,
Petitioners,

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

ARGUMENT

I. *PINKERTON*

1. The government conceded at oral argument in the court of appeals that the district court erred in omitting the "reasonable foreseeability" element from its *Pinkerton* instruction. In this Court, the government acknowledges that "[t]he better practice is to include 'reasonable foreseeability' language in any *Pinkerton* instruction." Opp. 10. Despite these concessions, the government asserts that "the district court's instruction adequately conveyed *Pinkerton*'s theory of co-conspiratorial liability" by requiring the jury to find that "the substantive crime was committed during the existence or life of and in furtherance of the goals of the conspiracy." Opp. 10. But at least two courts of appeals have rejected this contention. *See United States v. Turcks*, 41 F.3d 893, 897 (3d Cir.

1994), *cert. denied*, 115 S. Ct. 1716 (1995); *United States v. Broadwell*, 870 F.2d 594, 603 (11th Cir.), *cert. denied*, 493 U.S. 840 (1989). The government's argument merely underscores the division among the courts of appeals over the proper scope of *Pinkerton* liability.

2. The government acknowledges that the circuits have split on whether the "reasonable foreseeability" element must be included in a *Pinkerton* charge. Opp. 9-10.[1] It suggests, however, that the split does not justify granting the petition, because "[w]e are aware of no case . . . in which a court of appeals has reversed a conviction because the *Pinkerton* instruction omitted such language." Opp. 10. In fact, at least one court *has* reversed a conviction under circumstances indistinguishable from this case. *United States v. Tang*, 1996 U.S. App. LEXIS 2548, at *8 (9th Cir. Feb. 2, 1996) (unpublished) ("We hold that reasonable foreseeability is an element of *Pinkerton* co-conspirator liability that must be specifically decided by the jury. The district court erred when it refused to submit this element to the jury. Under [the Ninth Circuit's decision in] *Gaudin*, such an error cannot be harmless." (quotation omitted)).

3. Other cases holding that omission of the "reasonable foreseeability" element constitutes error have declined to reverse under the "plain error" and "harmless error" doctrines. *See, e.g., Turcks*, 41 F.3d at 897-99 (plain error); *Broadwell*, 870 F.2d at 609 (harmless error).[2] But the results in these cases do not diminish the importance of the circuit split on the "reasonable foreseeability" element of *Pinkerton*. The issue presented here—and the

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[1] The split has deepened since the petition was filed. The Tenth Circuit has now joined the Fourth in holding that "reasonable foreseeability" is not an essential element of *Pinkerton* liability. *United States v. Willis*, 102 F.3d 1078 (10th Cir. 1996).

[2] Because petitioners made a timely objection to the district court's omission of the "reasonable foreseeability" element, no question of "plain error" arises here.

issue decided by the Fourth Circuit below (Pet. App. 17a-22a)—is whether *Pinkerton* liability requires proof that the substantive offense was reasonably foreseeable. The parties agree that this issue has split the circuits. The Court should resolve the split, particularly because the Court itself created *Pinkerton* liability and no statutory language or legislative history exists to guide the lower courts.[3]

4. The government contends that the Court should deny the petition because the district court's omission of the reasonable foreseeability element was harmless. Opp. 10. But for the reasons stated above, the harmless error issue need not be addressed here with respect to the *Pinkerton* instruction; the court of appeals did not address that issue, and petitioners have not raised it here. Thus, the asserted harmlessness of the district court's error provides no basis to deny the petition.

5. The government's discussion of harmless error misses the mark in any event. The government contends that the omitted reasonable foreseeability instruction was harmless because "it appears likely that petitioners' convictions on the substantive counts rested not on a *Pinkerton* theory, but on their direct involvement in the substantive offenses at issue, either as principals or as aiders and abettors." Opp. 10-11. The government's argument overlooks the rule of *Stromberg v. California*, 283 U.S. 359 (1931), and its progeny. In *Stromberg*, this Court held that when the trial court instructs on several theories of criminal liability, one of which contains a constitutional flaw—as the *Pinkerton* theory did here—and the jury returns a general verdict of guilty, an appellate court must presume that the jury relied on the constitutionally defec-

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[3] To our knowledge, the *Pinkerton* doctrine is the only non-statutory basis for criminal liability under federal law.

tive theory. *See, e.g., Griffin v. United States*, 502 U.S. 46, 55-60 (1991); *Stromberg*, 283 U.S. at 368.[4]

6. Under *Griffin* and *Stromberg*, the Court must presume that the jury relied on the improper *Pinkerton* instruction, and any harmless error inquiry must incorporate that presumption. The Court must conduct the harmless error inquiry as if the jury had been instructed solely on the *Pinkerton* theory of liability. This analysis presents two questions (neither of which the government addresses): whether omission of the "reasonable foreseeability" element is subject to harmless error review, and, if so, the nature of that review.

7. On the first point, several cases have concluded that failure to instruct the jury on an element essential to a finding of criminal liability cannot be harmless. *See, e.g., United States v. Wiles*, 102 F.3d 1043 (1996) (en banc), *modified in part on other grounds*, 1997 U.S. App. LEXIS 2736 (10th Cir. Feb. 14, 1997); *Tang*, 1996 U.S. App. LEXIS 2548, at *8; *United States v. Baumgardner*, 85 F.3d 1305, 1309-10 (8th Cir. 1996); *United States v. Pettigrew*, 77 F.3d 1500, 1511 (5th Cir. 1996). Other cases have applied some form of harmless error review to instructions that omit an essential element. *See, e.g., United States v. Keys*, 95 F.3d 874, 880-81 (9th Cir. 1996) (en banc), *petition for cert. filed* (Jan. 9, 1997); *United States v. Rogers*, 94 F.3d 1519, 1524-27 (11th

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[4] Apart from overlooking the *Stromberg* rule, the government understates its burden of establishing harmlessness (if harmless error analysis applies at all, *see infra*). The government has the burden of showing that constitutional error is harmless beyond a reasonable doubt. *See, e.g., Arizona v. Fulminante*, 499 U.S. 279, 295 (1991); *Chapman v. California*, 386 U.S. 18, 24 (1967). The government's bare assertion that "it appears likely" that the jury did not rely upon the *Pinkerton* theory does not come close to satisfying the "beyond a reasonable doubt" standard. The government's harmless error argument is further undercut by the fact that it requested the *Pinkerton* instruction, Pet. App. 17a, and it argued the *Pinkerton* theory to the jury in closing. Having urged the *Pinkerton* theory vigorously at trial, the government cannot argue now that the jury ignored that theory.

Cir. 1996), *petition for cert. filed* (Feb. 12, 1997). In light of this split in the circuits, the harmless error issue itself merits the Court's review, if the Court should decide to reach it.

8. On the second point—the nature of any harmless error review of the omitted "reasonable foreseeability" instruction—petitioners should prevail. Courts that have applied harmless error review to an omitted element have done so narrowly; such courts typically have held that the omission is harmless only when "the jury necessarily found the omitted element." *Keys*, 95 F.3d at 881; *see, e.g., Waldemer v. United States*, 98 F.3d 306, 309 (1996), *modified in part*, 1997 U.S. App. LEXIS 823 (7th Cir. Jan. 16, 1997). The government has never argued here —and could not do so—that the jury "necessarily found" the "reasonable foreseeability" element.

9. The Court should grant the petition to determine whether "reasonable foreseeability" constitutes an essential element of *Pinkerton* liability. In light of the government's harmless error argument, the Court might also wish to determine whether harmless error can apply to an instruction that omits an element essential to a finding of criminal liability and, if so, the nature of that review.

II. DIRECTED VERDICT ON MATERIALITY.

1. The government asserts that "any false statement on a tax return that underreports income or overstates deductions is necessarily material *as a matter of law*." Opp. 12 (emphasis added). The government's contention conflicts with this Court's decision in *United States v. Gaudin*, 115 S. Ct. 2310 (1995), which holds that the jury—and not the court—must decide the question of materiality. *See United States v. Uchimura*, 1997 U.S. App. LEXIS 3292, at *10-*11 (9th Cir. Feb. 25, 1997) (applying *Gaudin* to determination of materiality under 26 U.S.C. § 7206); *United States v. Dirico*, 78 F.3d 732, 736 (1st Cir. 1996) (same); *United States v. DiDomenico*, 78 F.3d 294, 302-03 (7th Cir.) (same), *cert. denied*,

117 S. Ct. 507 (1996). *But see United States v. Klausner*, 80 F.3d 55, 61 (2d Cir. 1996) (finding, after *Gaudin*, that materiality is a question of law under § 7206), *petition for cert. filed* (Nov. 12, 1996).

2. Apart from conflicting with *Gaudin*, *Uchimura*, *Dirico*, and *DiDomenico*, the government's argument does not address the issue here. The Fourth Circuit assumed that the district court should have submitted the materiality issue to the jury, Pet. App. 26a, and it proceeded directly to the harmless error inquiry, Pet. App. 26a-30a. That is the only issue that the court of appeals decided with respect to the § 7206 counts, and it is the issue that petitioners seek to have this Court review. In *Gaudin*, this Court held that materiality under 18 U.S.C. § 1001 must be submitted to the jury, without first deciding whether materiality is an element of a § 1001 offense. *See* 115 S. Ct. at 2322-23 (Rehnquist, C.J., concurring) (noting that the issue had not been decided). In the same fashion, the Court can address the harmless error issue here, without first deciding whether materiality under § 7206 must be submitted to the jury.[5]

3. As petitioners demonstrated previously, Pet. 13-14, the circuits have split on whether a directed verdict on an element of an offense can be harmless error. That split has deepened since the petition was filed. *Compare Uchimura*, 1997 U.S. App. LEXIS 3292, at *13-*15 (directed verdict on materiality "structural" error not subject to harmless error review); *Wiles*, 102 F.3d 1043 (failure to instruct on materiality "structural" error not subject to harmless error review), *with United States v. De Castro*, 104 F.3d 1289 (11th Cir. 1997) (directed verdict on materiality subject to harmless error review).[6]

[5] In light of the conflict between *Uchimura*, *Dirico*, and *DiDomenico* on one hand and *Klausner* on the other, the Court might wish to decide whether, following *Gaudin*, the issue of materiality under § 7206 must be submitted to the jury.

[6] The government confuses the issue by referring to the error here as an "instructional omission" and a "failure to submit the

4. The government attempts to reconcile the decisions of the courts of appeals on the ground that no case "has reversed a conviction for *Gaudin* error even where, as here, the jury actually made the functional equivalent of a materiality finding." Opp. 14. But a fair reading of *Uchimura*, *Wiles*, *Dirico*, and *Pettigrew* leaves no room to argue that those cases might have reached a different result if the "functional equivalent" standard had been met. Each case concludes that a partial directed verdict on materiality constitutes a "structural" defect that requires reversal without harmless error analysis. Those decisions conflict squarely with other cases (cited at Pet. 13 and Opp. 14) that apply harmless error review to a partial directed verdict. The Court should grant the petition to resolve the split.

III. ATTORNEY-CLIENT PRIVILEGE.

1. The government notes that the declarations of the lawyers and other documents produced by the prosecution tended to show that Aramony did not have an attorney-client relationship with Carter and the Verner, Liipfert attorneys. Opp. 16-17. It concludes that "it was well within the district court's discretion to deny an evidentiary hearing on the issue of attorney-client privilege." Opp. 16. But the government—like the courts below—ignores the substantial contrary evidence, which we summarized in part at Pet. 3. In light of the significant conflicts

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materiality issue to the jury." *E.g.*, Opp. 13. In fact, the district court did not merely omit materiality from its instructions; it directed a verdict on that issue. The courts of appeals have split over whether harmless error review applies differently to instructions that direct a verdict on an element and instructions that omit an element. *Compare De Castro*, 104 F.3d 1289 (applying harmless error to partial directed verdict), *with Keys*, 95 F.3d at 880-81 (partial directed verdict not subject to harmless error review; omission of element may be harmless under narrow circumstances), *and Rogers*, 94 F.3d at 1526 n.13 (same).

between the opposing declarations and the remainder of the documentary record, Aramony had a right to an evidentiary hearing as a matter of due process.

2. The government faults Aramony for his asserted "failure to present credible evidence of his own to support his privilege claims." Opp. 16-17. But as we have demonstrated, Pet. 3, Aramony *did* present such evidence. And he would have produced more—and exposed the shortcomings of the government's contrary evidence—if the district court had conducted an evidentiary hearing on the attorney-client issue. The government's position on this point is patently unfair; it criticizes Aramony for not producing evidence after having fought tooth and nail in the courts below to deny him the hearing at which he could do so.[7]

3. Similarly, as to Merlo, the government fails to address the fact that Merlo's former counsel, John Hume —who violated Merlo's attorney-client privilege by disclosing information to the government in a pre-indictment interview, without Merlo's knowledge or authority—was present in court and prepared to offer testimony at the hearing on Merlo's motion to suppress. Pet. App. 54a. Despite Hume's presence, the court denied Merlo's request for a hearing.

4. The petition cites a series of cases from other circuits with which the court of appeals' decision conflicts. Pet. 14-15. The government offers no analysis of those cases. It simply asserts that "[i]n the decisions at issue, the defendants had made more colorable claims of privilege than petitioners made here, and they therefore had

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[7] The government asserts that Aramony "did not seek the testimony of the Verner, Liipfert attorneys." Opp. 5. That is incorrect. Although Aramony did not call the Verner, Liipfert attorneys as witnesses *before the jury at trial*, he requested an evidentiary hearing at each stage—before, during, and after trial—at which those attorneys could be questioned.

a more plausible factual basis for seeking appellate relief based on the denial of an evidentiary hearing." Opp. 17. But even a cursory reading of those cases demonstrates the government's error. The declarations and other documents presented to the district court established every bit as "plausible" a "factual basis" for appellate relief as did the defendants in the cases on which petitioners rely. The decision of the court of appeals conflicts squarely with those cases, and this Court should grant the petition to resolve that conflict.

IV. THEORY OF THE DEFENSE INSTRUCTION.

Merlo clearly requested that the district court give a theory of the defense instruction, which the court said it would not give. Pet. App. 69a. The tendering of such an instruction for filing the following morning would have been mere surplusage in light of the court's ruling that it would not give any theory of defense instruction, no matter what was tendered. Pet. App. 69a. As discussed in the petition, the law is clear that Merlo was entitled to such an instruction. The district court's erroneous refusal has been upheld by the court of appeals, which conflicts with the law of other circuits. The Court should therefore grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

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